DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-462
Title: Northwest, Inc., et al., Petitioners
v.
Rabbi S. Binyomin Ginsberg
Docketed: October 15, 2012
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (09-56986)
Decision Date: July 13, 2012
Rehearing Denied: August 5, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 11 2012	Petition for a writ of certiorari filed. (Response due November 14, 2012)
Nov 8 2012	Order extending time to file response to petition to and including December 14, 2012.
Nov 14 2012	Brief amici curiae of Airlines for America and American Trucking Associations, Inc. filed.
Dec 14 2012	Brief of respondent Rabbi S. Binyomin Ginsberg in opposition filed.
Dec 26 2012	DISTRIBUTED for Conference of January 11, 2013.
Dec 26 2012	Reply of petitioners Northwest, Inc., et al. filed. (Distributed)
Jan 14 2013	DISTRIBUTED for Conference of January 18, 2013.
May 13 2013	DISTRIBUTED for Conference of May 16, 2013.
May 20 2013	Petition GRANTED.
Jun 14 2013	The time to file the joint appendix and petitioners' brief on the merits is extended to and including July 24, 2013.
Jun 14 2013	The time to file respondent's brief on the merits is extended to and including September 12, 2013.
Jul 9 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jul 24 2013	Joint appendix filed. (Statement of costs filed.)
Jul 24 2013	Brief of petitioners Northwest, Inc., et al. filed.
Jul 31 2013	Brief amicus curiae of the United States filed.
Jul 31 2013	Brief amicus curiae of Airlines for America and American Trucking Associations, Inc. filed.
Jul 31 2013	Brief amicus curiae of International Air Transport Association filed.
Jul 31 2013	Brief amicus curiae of Cargo Airline Association filed.

Jul 31 2013	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Sep 12 2013	Brief of respondent Rabbi S. Binyomin Ginsberg filed.
Sep 17 2013	SET FOR ARGUMENT ON Tuesday December 3, 2013.
Sep 17 2013	CIRCULATED
Sep 17 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 18 2013	Record from U.S.C.A. for 9th Circuit is electronic.
Sep 18 2013	Record for U.S.D.C. for Southern District of California is electronic.
Sep 19 2013	Brief amicus curiae of Steven J. Burton, Professor of Law filed. (Distributed)
Sep 19 2013	Brief amici curiae of California, et al. filed. (Distributed)
Sep 19 2013	Brief amici curiae of Jobs With Justice, et al. filed. (Distributed)
Oct 15 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 15 2013	Reply of petitioner Northwest, Inc., et al. filed. (Distributed)
Dec 3 2013	Argued. For petitioners: Paul D. Clement, Washington, D. C.; and Lewis S. Yelin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Adina H. Rosenbaum, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

12-462

Supreme Court, U.S.
FILED
OCT 11 2012
OFFICE OF THE CLERK

NO. _____

In the
Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., and DELTA AIR LINES, INC., a Delaware corporation,
PETITIONERS,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 11, 2012

QUESTION PRESENTED

The Airline Deregulation Act of 1978 ("ADA") includes a preemption provision providing that States "may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b).

Respondent was a participant in Northwest Airlines' frequent flyer program, which by its terms permitted Northwest to remove participants from the program in Northwest's "sole judgment." After respondent was removed from the frequent flyer program, he filed suit against Northwest alleging, inter alia, that Northwest breached both its contractual obligations and an implied covenant of good faith and fair dealing under Minnesota law when it exercised its discretion to terminate respondent's membership in the program. Although the district court dismissed the contract claim for failure to state a claim and the implied covenant of good faith claim as preempted by the ADA, the Ninth Circuit reversed as to the implied covenant claim, finding such claims categorically unrelated to a price, route or service under a line of Ninth Circuit cases that have been recognized by other Circuits as inconsistent with this Court's precedents, especially *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

The question presented is:

Did the court of appeals err by holding, in conflict with the decisions of other Circuits, that respondent's implied covenant of good faith and fair dealing claim

was not preempted under the ADA because such claims are categorically unrelated to a price, route, or service, notwithstanding that respondent's claim arises out of a frequent flyer program (the precise context of *Wolens*) and manifestly enlarged the terms of the parties' voluntary undertakings, which allowed termination in Northwest's sole discretion.

PARTIES TO THE PROCEEDINGS

Petitioners, who were the defendants-appellees below, are Northwest Airlines, Inc. and Delta Air Lines, Inc. Respondent, who was plaintiff-appellant below, is Rabbi S. Binyomin Ginsberg. Respondent seeks to represent a class composed of all other members of Northwest Airlines, Inc.'s customer loyalty program, WorldPerks, whose program status was allegedly revoked without valid cause during the four years prior to the filing of the Complaint.

RULE 29.6 STATEMENT

Petitioners, which are private, non-governmental parties, hereby disclose and state that (a) Delta Air Lines, Inc. has no parent corporation and there are no publicly held corporations that own ten percent (10%) or more of Delta Air Lines, Inc.'s stock; and (b) Delta Air Lines, Inc. is the parent corporation of Northwest Airlines, Inc. and owns ten percent or more of Northwest Airlines, Inc.'s stock.

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OPINIONS BELOW

The initial opinion of the Ninth Circuit reversing dismissal of the complaint and remanding to the district court is reported at 653 F.3d 1033 and reproduced at App. 20-40.

The amended opinion of the Ninth Circuit, reversing dismissal of the complaint and remanding to the district court is reproduced at App. 1-19.

The district court's opinion granting petitioners' motion to dismiss the complaint is unreported and reproduced at App. 56-73.

The district court's opinion denying respondent's motion for reconsideration is unreported and reproduced at App. 41-55.

JURISDICTION

The Ninth Circuit denied Northwest's petition for rehearing and rehearing en banc on July 13, 2012. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C § 41713, is reproduced at App. 74.

STATEMENT OF THE CASE

I. The ADA and This Court's ADA Preemption Cases

Congress enacted the Airline Deregulation Act ("ADA") in 1978 with the purpose of furthering "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive

market forces." 49 U.S.C. App. § 1302(a)(4). "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992), the ADA includes a preemption provision providing that States "may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b).

This Court has addressed the preemptive scope of the ADA and its sister statute on three occasions. In *Morales v. Trans World Airlines*, the Court held that the ADA preempts States from prohibiting deceptive airline fare advertisements through enforcement of their general consumer protection statutes. Explaining that the phase "relating to" indicates the ADA's "broad preemptive purpose," 504 U.S. at 383, the Court concluded that the preemption provision encompasses all state laws "having a connection with or reference to" airline rates, routes, or services, *id.* at 384, even if the state law's effect on rates, routes, or services "is only indirect," *id.* at 386. The Court noted, however, that the ADA may not preempt state laws that affect rates, routes, or services in only a "tenuous, remote, or peripheral . . . manner," such as state laws criminalizing gambling or prostitution, or prohibiting obscenity in advertising. *Id.* at 390.

Three years later, this Court considered *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), a class action suit challenging American Airline's efforts to make changes to its frequent flyer program, in particular the imposition of blackout dates and caps on the number of seats available to passengers using

frequent flyer miles. The Court began by noting that frequent flyer programs obviously relate to both prices and services, and that it "need not dwell on the question" any further. *Id.* at 226. The Court observed, however, that "the ADA's preemption clause contains other words in need of interpretation, specifically the words 'enact or enforce any law.'" *Id.* The Court held that while the plaintiffs' claim under an Illinois consumer fraud statute required the enforcement of state law, their breach of contract claim sought "recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 227-28. "A remedy confined to a contract's terms simply holds parties to their agreements," *Wolens* explains, and thus does not amount to the enactment or enforcement of state law. *Id.* at 229. The Court thus dismissed the plaintiffs' fraud claim but allowed their breach of contract claim to proceed.

Finally, in *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), this Court considered the preemptive effect of a provision in the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 40120, *et seq.*, prohibiting States from enacting any law "related to" a motor carrier's "price, route, or service," 49 U.S.C. § 14501(c). The plaintiffs argued that this provision preempted a Maine law forbidding any person from knowingly transporting tobacco products to a person in Maine unless either the sender or receiver has a Maine license, and requiring tobacco retailers to use a delivery service verifying that the recipient of a tobacco order may legally purchase tobacco. *Rowe*, 552 U.S. at 368-69. This Court began its analysis by noting that Congress borrowed the language in the

FAAAA's preemption provision from the ADA and intended that the two provisions be interpreted in the same way. *Id.* at 370. The Court then held that under *Morales*, the Maine law related to motor carrier services because, although it did not directly apply to carriers, it prompted tobacco suppliers to seek "tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Id.* at 371-72. The Court also noted that if, as *Wolens* holds, "federal law pre-empts state regulation of the details of an air carrier's frequent flyer program, . . . it must pre-empt state regulation of the essential details of a motor carrier's system for picking up, sorting, and carrying goods." *Id.* at 373.

II. Ginsberg's Class Action Suit Against Northwest

Respondent Binyomin Ginsberg is a former member of Petitioner Northwest's WorldPerks Platinum Elite frequent flyer program. Northwest revoked Ginsberg's membership on June 27, 2008. App. 3. According to Ginsberg, he was told by a Northwest representative that his status was revoked because he had "abused" the program. App. 4. More specifically, Ginsberg attached to his Complaint a letter he received from Northwest stating that between December 2007 and July 2008, Ginsberg filed 24 complaints with Northwest and "'continually asked for compensation over and above [Northwest's] guidelines.'" App. 57 (quoting Compl. Ex. A).

Alleging that Northwest revoked his WorldPerks status without valid cause, Ginsberg filed this suit as a class action on behalf of himself and other members

of WorldPerks whose membership allegedly was revoked without valid cause during the four years before the filing of the Complaint. Ginsberg seeks damages on behalf of the class in excess of $5 million, as well as injunctive relief requiring Northwest to restore the WorldPerks status of the Class members and prohibiting Northwest from future revocations of the Class members' WorldPerks status without valid cause. Dist. Ct. Doc. No. 1, at ¶ 2.

Ginsberg acknowledges that the General Terms and Conditions of the WorldPerks program ("the Agreement") grant Northwest discretion to remove someone from the program:

> Abuse of the WorldPerks program (including failure to follow program policies and procedures, the sale or barter of awards or tickets and any misrepresentation of fact relating thereto or other improper conduct *as determined by Northwest in its sole judgment*, including, among other things, . . . any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees' instructions) may result in cancellation of the member's account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards.

App. 58 (emphasis added).

Ginsberg speculates that he was dismissed for "untoward or harassing behavior with reference to [a] Northwest employee." Dist. Ct. Doc. No. 1, at ¶ 29. He

argues, however, that the Agreement fails to sufficiently define "improper conduct" and "untoward or harassing behavior." *Id.* at ¶ 30. He also claims that any alleged abusive conduct by him was the result of the frequency with which he travels on Northwest, and that his complaints and conduct were all legitimate. *Id.* at ¶¶ 32, 33, 35, 38. And he alleges that he never received an adequate explanation from Northwest for the revocation decision. *Id.* at ¶ 29.

III. The District Court Dismisses Ginsberg's Suit as Largely Preempted Under the Airline Deregulation Act

Ginsberg asserted four causes of action under state law: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; (3) negligent misrepresentation; and (4) intentional misrepresentation. App. 58-59.

The district court dismissed the complaint, explaining that all but the breach of contract claim are preempted under the ADA and this Court's precedents. The district court observed that this Court made "abundantly clear" in *Wolens*, 514 U.S. at 226, that "a frequent flier program relates to 'prices' and 'services,' and the WorldPerks program at issue here is none other than a frequent flier program." App. 69. The court concluded that "[b]ecause Plaintiff's claims for breach of the covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation require the enforcement of state law and relate to both airline prices and services, all are preempted by the ADA." App. 69.

With regard to Ginsberg's breach of contract claim, the district court explained that under *Wolens*, claims that "an airline breached terms of a contract the airline 'itself stipulated'" are not preempted by the ADA because such claims do not involve the enforcement of state law, but rather the enforcement of the parties' own voluntary undertakings. App. 69-71. The court nonetheless dismissed the claim because Ginsberg's complaint failed to identify any material breach of the WorldPerks Agreement. The Agreement "states unambiguously that abuse of WorldPerks, including 'improper conduct as determined by Northwest *in its sole judgment*' is grounds for membership cancellation." App. 71 (quoting the Agreement). The district court explained that although Ginsberg complained that he was not provided an adequate explanation for Northwest's revocation decision and that "improper conduct" is not well defined in the agreement, "Northwest was not required by the agreement to explain its decisions or define what it considers 'improper conduct.' To hold that Northwest was required to explain itself to Plaintiff's satisfaction would be an 'enlargement or enhancement' of the parties' agreement beyond its express terms, which *Wolens* does not allow." App. 71. Accordingly, the district court dismissed the breach of contract claim for failure to state a claim, but without prejudice so that Ginsberg would have an opportunity to amend his complaint to include allegations of an actual breach of contract. App. 72.

Ginsberg had argued that his "breach of implied covenant of good faith claim and fair dealing claim" (hereinafter "implied covenant of good faith claim") was also a "breach of contract" claim merely seeking to

enforce the terms and conditions of the WorldPerks program, because "every contract imposes upon each party a duty of good faith and fair dealing." Dist. Ct. Doc. No. 11, at 8 (internal quotation omitted). Ginsberg argued that he and the rest of the Class were entitled to recovery under this theory because although the WorldPerks Agreement allows for dismissal based on Northwest's "sole judgment," Minnesota law imposes extra-contractual "good faith" obligations limiting Northwest's exercise of its "sole judgment." *See id.* at 5-13. The district court rejected this argument, however, observing that Ginsberg "misses that this duty does not appear *ex nihilo*, and is not imposed by the contract itself (unless it so stipulates). Rather, it is implied by state law." App. 64-65. The court explained: "That parties must act in good faith and deal fairly with one another is a requirement of state policy, external to the contract itself, that is given 'the force and effect of law.'" App. 65

Ginsberg moved for reconsideration, arguing that the district court erred in failing to recognize that the ADA's preemption clause does not apply to state common law claims. Ginsberg asserted that "[t]o preempt a cause of action under the ADA according to *Wolens*, one need identify an offending state statute, that affects the zone of pre-empted activities, and establish that an action lies without a connection to preserved contract rights." Dist. Ct. Doc. No.17, at 6. He also argued that his implied covenant of good faith claim was not preempted because "[i]n Minnesota, every contract is subject to an implied covenant known as a covenant of good faith and fair dealing,

which is automatically deemed to be part of a contract." *Id.* at 12.

The district court denied the motion, explaining that this Court's decision in *Wolens* makes no distinction between state common law and state statutes, but instead distinguishes "between terms an airline itself stipulates on the one hand, and *any* 'enlargement or enhancement based on state laws or policies external to the agreement.'" App. 45 (quoting *Wolens*, 513 U.S. at 233). The district court observed that "state common laws [a]ffecting contracts are not – as the *Wolens* court demands to avoid preemption – terms of the contract itself. They are expansions beyond the explicit terms of the contract, as demonstrated by the fact that they apply regardless of whether the parties agree to them in the contract itself. They exist independently of the contract." App. 46. With regard specifically to Ginsberg's implied covenant of good faith claim, the district court noted its earlier holding, not challenged in the reconsideration motion, that Ginsberg "failed to allege any actual violation of the WorldPerks agreement." App. 47. Accordingly, the district court explained, Ginsberg's implied covenant of good faith claim must be dismissed either for failure to state a claim or because it is based on the alleged violation of an obligation not found in the terms of the agreement and instead arising out of preempted state law. App. 47-48.

IV. The Ninth Circuit Reinstates Ginsberg's Claim for Breach of Implied Covenant of Good Faith as Categorically Exempted from ADA Preemption

Ginsberg appealed to the Ninth Circuit only with respect to the dismissal of his implied covenant of good faith claim. The Ninth Circuit reversed, holding that such claims are categorically exempted from ADA preemption. App. 21. The Ninth Circuit cited its decisions in *West v. Northwest Airlines, Inc.*, 995 F.2d 148, 151 (9th Cir. 1993), holding that implied covenant of good faith claims are "too tenuously connected to airline regulation to trigger preemption under the ADA," and in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc), holding that the ADA does not preempt common law remedies so long as they "do not significantly impact federal deregulation." App. 33. The court of appeals held that these cases are consistent with this Court's holding in *Wolens* that claims based on "contract law" are not preempted under the ADA. App. 29-30.

The Ninth Circuit also reasoned that, despite *Wolens* and its frequent flyer program context, implied covenant of good faith claims do not "relate to" prices or services because the legislative history of the ADA indicates that Congress intended the preemption provision "only to apply to state laws directly regulating rates, routes, or services." App. 37 (internal quotation omitted). Citing *Charas* for the proposition that "services" is defined narrowly under the ADA, the court of appeals held that "[a] claim for breach of good faith and fair dealing does not relate to

'services' because it has nothing to do with schedules, origins, destinations, cargo, or mail." App. 38.

Judge Rymer filed a concurring opinion explaining that although she believed the panel's holding to be compelled by the Ninth Circuit's decision in *West*, "*West*'s rule for contract claims seems out of step with the Supreme Court's holding" in *Wolens*. Judge Rymer also observed that the decision "places us in tension with the Seventh Circuit," in particular *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996), which holds that this Court's decision in *Morales* "does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted by the ADA." App. 39. Judge Rymer noted that if *West* "were not in the picture," the court would be faced "with the *Wolens* inquiry of whether Ginsberg's claim alleges a violation of a state-imposed obligation or a self-imposed undertaking." App. 40. Judge Rymer found this to be "a difficult question," not answered by the panel's decision, but "the answer [to which] is important for airlines who otherwise may be required to defend contract actions under a variety of state laws whenever they enact changes in their frequent flyer programs." App. 40.

Northwest filed a petition for rehearing or rehearing en banc. While the petition was pending, Judge Rymer passed away. When the court of appeals eventually ruled on the petition, Judge Rymer was replaced on the panel by Judge Schroeder. The court denied the petition, but amended its decision to delete Judge Rymer's concurrence, and to delete the final two paragraphs of the main opinion discussing the

court's holding in *Charas* that the term "services" does not include "fringe benefits" having "nothing to do with schedules, origins, destinations, cargo, or mail." *Compare* App. 19 *with* App. 38-39.

REASONS FOR GRANTING THE PETITION

Over the last 20 years, this Court has addressed the preemptive effect of the ADA and FAAAA on three occasions – *Morales*, *Wolens*, and *Rowe*. Consistent with Congress's intent, these decisions interpret the ADA and FAAAA to provide the airline and transportation industries with substantial protection from state statutory and common law claims that impose extra-contractual duties, while allowing plaintiffs to enforce the terms of voluntary undertakings by bringing contract claims. Although most lower courts have followed this Court's guidance, the Ninth Circuit has charted its own path that veers further and further from this Court's jurisprudence with each decision the Ninth Circuit issues. The decision below – finding a breach of implied covenant claim about a frequent flyer program, the precise context of this Court's *Wolens* decision, not related to prices and services even though the state law claim would directly override the terms of the parties' voluntary undertaking – is the culmination of this trend and conflicts with the decisions of this Court and the other Circuits which follow this Court's precedents.

This case is the most recent in a trifecta of Ninth Circuit ADA decisions that numerous courts have described as profoundly at odds with this Court's precedent and the source of significant Circuit conflict. Rather than acknowledging – as many other courts

have – that the Ninth Circuit's prior decisions in *West* and *Charas* cannot possibly be good law following this Court's holdings in *Wolens* and *Rowe*, the decision below expressly affirms and relies upon *West* and *Charas*, thus entrenching and perpetuating the already existing conflict between the Ninth Circuit's interpretation of the ADA and that of this Court and the other courts of appeals.

The decision below is the *non plus ultra* of the Ninth Circuit's deviation from the teachings of this Court. *Wolens* was clear that whether a particular claim is preempted under the ADA turns not on the plaintiff's labeling of the claim but on the extent to which the plaintiff's arguments invoke laws or policies outside the scope of the parties' agreement to enlarge the parties' voluntary undertakings. Ginsberg's implied covenant of good faith claim is a prototypical preempted claim: Ginsberg seeks to circumvent the terms and conditions of Northwest's frequent flyer program, which gives Northwest sole discretion to determine whether a member's behavior constitutes abuse warranting dismissal from the program, by invoking state law purporting to limit that discretion. It is hard to imagine a claim that more obviously enlarges the parties' bargain than a claim that an airline breached an "implied" duty of good faith and fair dealing notwithstanding the parties' express agreement that the dispute at issue is left to the airline's "sole judgment." Nor can there be any serious dispute that Ginsberg is invoking state law in a manner that relates to prices and services – despite the Ninth Circuit's contrary holding, *Wolens* specifically holds that claims arising out of disputes

over frequent flyer programs *easily* satisfy that requirement.

The Ninth Circuit's ruling provides a model for plaintiffs to eviscerate the preemptive effect of the ADA and FAAAA simply by labeling their state law claims as "breach of implied covenant of good faith" claims. This categorical exemption for implied covenant of good faith claims undermines the ADA's purpose of uniformity and efficiency by exposing airlines and other carriers to a patchwork of state laws that, depending on the state, may impose an inquiry into reasonableness or good-faith motivation every time an airline or carrier acts under the express terms of a specific agreement. The decision below also widens the gulf between the Ninth Circuit and the rest of the federal judiciary, declaring all implied covenant of good faith claims exempt from ADA preemption despite contrary holdings by the vast majority of courts to address this issue, including the First and Seventh Circuits.

The consequences of the conflict between the Ninth Circuit and this Court extend beyond implied covenant of good faith claims. At the center of the Ninth Circuit's flawed decision is its persistent failure to apply the analytical framework articulated in this Court's ADA and FAAAA jurisprudence. *Wolens* specifically explains that the narrow preemption exemption for breach of contract claims arises from the fact that such claims involve only the enforcement of the parties' own self-imposed obligations and do not require the enforcement of any state law. Instead of recognizing that Ginsberg's implied covenant of good faith claim is a paradigmatic effort to expand an

airline's obligations beyond its voluntary undertaking, the Ninth Circuit insisted that *Wolens* somehow supports its holdings in *West* and *Charas* that entire categories of common law contract and tort claims are wholly exempt from ADA preemption, regardless whether the plaintiff's underlying allegations or theory of recovery relate to routes, rates or services or rely on the enactment or enforcement of state law. This Court's intervention is necessary to put an end to a growing body of Ninth Circuit ADA jurisprudence causing significant conflict among the Circuits and robbing the airline and transportation industries of many of the protections Congress intended the ADA and FAAAA to afford.

I. The Ninth Circuit's Decision Below is Wrong and Irreconcilable with This Court's Precedent

A. *Wolens* does not remotely support the Ninth Circuit's categorical exemption of implied covenant of good faith claims from ADA preemption

In *Wolens*, this Court recognized a narrow exception to ADA preemption for "routine breach-of-contract claims" that seek only to "give effect to bargains offered by the airlines and accepted by airline customers." 513 U.S. at 228. The plaintiffs in *Wolens* argued that American Airline's changes to its frequent flyer program, imposing blackout dates and caps on available seats, violated the terms and conditions of the membership agreement, thus constituting a breach of contract. The Court explained that although the allegations obviously related to airline rates and services within the meaning of the

ADA, the plaintiffs based their breach of contract claim entirely on "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 232-33. Because such claims are "confined to a contract's terms," seeking "simply [to] hold[] parties to their agreements," they do not rely on the enactment or enforcement of state law and thus do not trigger ADA preemption. *Id.* at 229.

As the district court correctly recognized, Ginsberg's claim for breach of an implied covenant of good faith, as opposed to his contract action that failed to state a breach, does not fall within the *Wolens* exception because the whole point of the claim is to override the contractual terms which granted Northwest "sole judgment" and doomed Ginsberg's contract claim. There is nothing subtle or difficult about this. The very name of the cause of action – an *implied* covenant of good faith – makes clear that state law is supplementing the express terms of the parties' voluntary undertaking. And the very fact that Ginsberg's contract claim fails on the merits underscores that the implied covenant claim adds something to the parties' agreement. As the district court aptly put it: Ginsberg's implied duty of good faith claim "does not appear *ex nihilo*, and is not imposed by the contract itself (unless it so stipulates). Rather, it is implied by state law." App. 64-65. Ginsberg does not contest that the terms of the WorldPerks program give Northwest sole discretion regarding membership termination. Instead, he argues that state law overrides that contractual provision and limits Northwest's exercise of its discretion. It is hard to imagine a more obvious example of using state law to

enhance the terms and conditions of an airline program beyond the airline's self-imposed undertakings.

The Ninth Circuit avoided grappling with the extra-contractual nature of Ginsberg's claim, instead simply declaring all implied covenant of good faith claims part of the arsenal of routine breach of contract claims saved from preemption in *Wolens*. But *Wolens* makes no mention of implied covenant of good faith claims and certainly does not suggest that such claims are categorically exempt from preemption. To the contrary, *Wolens* explicitly limits the contract actions that survive preemption to those that enforce self-imposed undertakings without enlarging the terms of the bargain.

Indeed, *Wolens* specifically observed that some state law principles of contract law would be preempted to the extent that "they seek to effectuate the State's public policies, rather than the intent of the parties." 513 U.S. at 233 n.8 (quoting Brief of the United States as Amicus Curiae at 28). As the First, Seventh, and Eighth Circuits have recognized, *Wolens* at the very least requires an individualized inquiry into the nature of the implied covenant of good faith claim asserted by the plaintiff, and cannot possibly support the categorical exemption adopted by the Ninth Circuit. *See Data Manufacturing, Inc. v. United Parcel Serv.*, 557 F.3d 849, 853-54 (8th Cir. 2009) (holding preempted state law claims based on implied contractual obligations, including an implicit duty not to charge unlawful penalties, because such claims were not part of the agreement between the parties); *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 34-37 (1st Cir.

2007) (finding plaintiffs' implied covenant of good faith claim preempted by the ADA because it imposed state policies on the airline by attempting to create implicit contract terms not found in the agreement); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 n.8 (7th Cir. 1996) (remanding to the district court to determine whether "the plaintiffs are relying on principles of contract law that . . . could be open to preemption under *Wolens*").

Ginsberg's claim clearly illustrates why the Ninth Circuit's blanket rule is irreconcilable with *Wolens*. Rule 7 of the WorldPerks Program states unambiguously that abuse of WorldPerks, including "improper conduct as determined by Northwest in its sole judgment," is grounds for "cancellation of the member's account and future disqualifications from program participation. . . ." App. 58. Ginsberg's implied covenant of good faith claim seeks a class-wide injunction prohibiting Northwest from revoking membership in its frequent flyer program on any basis not considered reasonable under state law, despite the fact that the terms and conditions of the program expressly reserve Northwest's right to exercise its "sole judgment" in determining whether someone has abused the program. As the district court explained, "Plaintiff in effect asks that the Court replace Northwest's judgment with his own regarding what counts as 'abuse' of WorldPerks. This, however, would transgress the unambiguous terms of the agreement by inserting into it external norms supplied by the Plaintiff, the Court, or both." App. 71-72. In short, Ginsberg seeks precisely the sort of enforcement of state law that *Wolens* identified as preempted under the ADA.

Moreover, the Ninth Circuit was flatly wrong in likening implied covenant of good faith claims to the breach of contract claims this Court contemplated would pose little risk of non-uniform adjudication across States. App. 16 (citing *Wolens*, 513 U.S. at 233 n.8). Many States reject implied covenant claims where, as here, the alleged good faith obligations are inconsistent with the contract's terms, including those expressly giving one party sole discretion with regard to particular actions. *See, e.g., Shoney's LLC v. MAC East, LLC*, 27 So.3d 1216, 1223 (Ala. 2009); *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 808 (Cal. Ct. App. 1995); *Chrysler Credit Corp. v. Dioguardi Jeep Eagle, Inc.*, 596 N.Y.S.2d 230, 232-33 (N.Y. App. Div. 1993). Other States, however, impose good faith and fair dealing obligations that override "sole discretion" clauses. *See, e.g., Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1187 (7th Cir. 1996); *A.I. Transp. v. Imperial Premium Fin., Inc.*, 862 F. Supp. 345, 348 (D. Utah 1994). To subject airlines to a "patchwork" of varying state laws (as well as inevitable forum shopping) on the implied covenant of good faith promises the uncertainty and inconsistency that the ADA sought to avoid. *Rowe*, 552 U.S. at 373.

B. This Court's precedent flatly contradicts the Ninth Circuit's conclusion that implied covenant of good faith claims are categorically unrelated to rates, routes and services under the ADA, regardless of the underlying allegations and theory of recovery

At the center of the Ninth Circuit's flawed decision is its persistent failure to apply the analytical

framework articulated in this Court's ADA jurisprudence. *Wolens* specifically explains that the narrow exemption for breach of contract claims arises from the fact that such claims involve only the enforcement of the parties' own self-imposed obligations and do not require the enforcement of any state law.

Instead of recognizing that this reasoning compels the rejection of Ginsberg's theory that a state-law implied covenant of good faith claim overrides the contractual "sole discretion" language, the Ninth Circuit insisted that *Wolens* is consistent with and indeed supports its holdings in *West* and *Charas* that certain categories of common law contract and tort claims are categorically unrelated to rates, routes, and services.

The incoherence of the Ninth Circuit's reasoning is on full display in its conclusion that Ginsberg's implied covenant of good faith claim does not relate to rates, routes, or services under the ADA despite the fact that *Wolens* expressly holds that claims arising out of disputes over frequent flyer benefits easily satisfy that requirement. *Wolens* rejected the plaintiffs' effort to separate "matters 'essential' from matters unessential to airline operations," with only the former preempted. *Wolens*, 513 U.S. at 226. Instead, *Wolens* viewed claims arising from a frequent flyer program to be obviously related to both rates and services: "Plaintiffs' claims relate to 'rates,' i.e., American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' i.e., access to flights and class of service upgrades unlimited by retrospectively applied capacity controls and blackout

dates." *Id.* And *Rowe* reiterates that under *Wolens*, "federal law pre-empts state regulation of the details of an air carrier's frequent flyer program." 552 U.S. at 373; *see also* App. 49-50 (the district court observing that it is "patently obvious" that Ginsberg's implied covenant of good faith claim relates to airline rates and services within the meaning of the ADA). The breach of contract claim in *Wolens* avoided preemption not because it was somehow unrelated to rates and services, but only because it did not involve the enforcement of state law – an exemption that plainly has no application to Ginsberg's implied covenant of good faith claim. The bottom line is that the decision below simply cannot be reconciled with *Wolens* and the preemptive scope of the ADA.

II. The Ninth Circuit's Decision in this Case is the Third in a Set of Ninth Circuit Cases Dramatically Departing from this Court's Precedent and Contributing to Significant Conflict Among the Circuits Regarding the Scope of ADA Preemption

The Ninth Circuit has its own trilogy of seminal ADA preemption cases. Unfortunately, the Ninth Circuit's trilogy bears little resemblance to this Court's decisions in *Morales*, *Wolens*, and *Rowe*. Although the first of the Ninth Circuit cases pre-dated *Morales*, the Ninth Circuit has not revisited its precedents in light of the intervening decisions of this Court, but rather has doubled down and insisted that its precedents are undisturbed. As a result, each one of its decisions takes the Ninth Circuit further from this Court's trilogy and deepens the conflict in the Circuits. As numerous other courts have recognized,

the Ninth Circuit's jurisprudence has been the source of significant Circuit conflict, and is profoundly at odds with this Court's holdings regarding the scope of the ADA's preemption clause.

A. *West v. Northwest Airlines*

Before this Court decided any of its ADA/FAAAA preemption cases, the Ninth Circuit addressed the scope of ADA preemption in *West v. Northwest Airlines*. West brought suit against Northwest seeking compensatory and punitive damages after he was bumped from a flight due to overbooking. Like Ginsberg, West argued that Northwest's actions constituted a breach of the implied covenant of good faith, although West based his claim on Montana rather than Minnesota law. *West v. Northwest Airlines, Inc.*, 995 F.2d 148, 150 (9th Cir. 1993). The Ninth Circuit held that the ADA preempted West's punitive damages claim, but did not preempt his claim for compensatory damages under Montana law. *Id.* While the parties' cross-petitions for certiorari were pending, however, this Court issued its decision in *Morales*. This Court subsequently denied West's petition, but granted Northwest's petition, vacated the decision, and remanded the case for reconsideration of the holding allowing West's compensatory damages claim to proceed. *Id.* Upon receiving a second petition from West arguing that the Supreme Court Rules prohibited granting certiorari on a cross-petition but not the initial petition, this Court vacated its earlier denial of West's petition and remanded the punitive damages holding for reconsideration as well. *Id.*

On remand, the Ninth Circuit reached the same conclusion it had before *Morales*, although this time

the decision was not unanimous. All of the panel members agreed that West's punitive damages claim was preempted because "[o]verbooking and bumping are accepted forms of price competition and reduction in the deregulation period, thus any law or regulation which results in penalizing airlines for these practices is preempted." *Id.* at 152. The panel majority nonetheless allowed West's claim for compensatory damages to proceed, on the theory that it was "too tenuously connected to airline regulation to trigger preemption under the ADA." *Id.*at 151.

Judge Brunetti dissented with regard to the compensatory damages claim, explaining that *Morales* "made clear that the 'relating to' language [in the ADA] is to have a very broad scope, encompassing within its reach statutes or actions 'having a connection with or reference to airline 'rates, routes, or services.'" *Id.* at 153. Judge Brunetti observed: "[O]ne strains to conceive of an action which could relate to those services more directly than a lawsuit seeking damages for the inevitable result of [an airline's] boarding practices." *Id.*

West soon became the subject of Circuit conflict. In 1995, the Fifth Circuit sitting en banc specifically noted its disagreement with *West* in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 339 (5th Cir. 1995) (en banc). The Fifth Circuit allowed to proceed a state tort claim alleging that the plaintiff was injured by luggage that fell out of an overhead compartment on a commercial airplane, explaining its position that claims for physical injury resulting from the negligent operation of an aircraft are not related to rates, routes, or services under the ADA. *Id.* at 336-37. The

Fifth Circuit emphasized, however, that its holding was narrow and "*does not* extend to" state tort claims that more clearly relate to airline services, pointing in particular to *West* as an example of claims that are "preempted under our interpretation of 'services.'" *Id.* at 339-40 (emphasis in original). The court of appeals explained, "[u]nder either *Morales* or the analysis advanced here, it is difficult to see how a lawsuit for overbooking would not 'relate to' the airline's contract for 'services' with its passenger." *Id.* at 340. The Fifth Circuit was not the only court to call out the Ninth Circuit's reasoning in *West* as obviously contrary to *Morales* – a New Jersey state court described *West* as reflecting the Ninth Circuit's "stunning indifference to *Morales*." *El-Menshawy v. Egypt Air*, 276 N.J. Super. 121, 126, 647 A.2d 491 (N.J. Sup. 1994).

Indeed, *Wolens* subsequently made clear the *West* majority's error in finding "the state contract and tort laws under which West seeks relief" – including an implied covenant of good faith claim – too tenuously related to routes, rates, and services to trigger preemption. In *Wolens*, this Court easily concluded that a breach of contract claim in that case related to rates and services because it arose out of a frequent flyer program. *Wolens*, 513 U.S. at 226. The Court found the breach of contract claim outside the scope of the ADA not because it was "too tenuously connected" to airline regulation under *Morales*, but because the claim did not involve the enactment or enforcement of state law. *Id.* at 227-29. If, as *Wolens* holds, a breach of contract claim arising out of a dispute over frequent flyer benefits relates to rates, routes and services under the ADA, then *West* cannot possibly be correct that an implied covenant of good faith claim arising

out of an overbooking incident does *not* relate to rates, routes, and services. Indeed, Judge Rymer observed in her concurrence, with some understatement, that "*West*'s rule for contract claims seems out of step with the Supreme Court's holding" in *Wolens*. App. 39.

This Court's subsequent decision in *Rowe* also squarely foreclosed the Ninth Circuit's holding that the claim in *West* did not relate to routes or services under the ADA. The tobacco regulations at issue in *Rowe* did not even apply to carriers, but this Court nonetheless found them preempted under the FAAAA because they prompted tobacco suppliers to seek "tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Rowe*, 552 U.S. at 372. If, as *Rowe* holds, state tobacco laws "relate to" rates, routes, and services if they regulate tobacco suppliers in a manner that impacts the delivery services that suppliers require from their carriers, then the *West* majority's reasoning that a claim asserting a breach of an implied duty of good faith not to overbook flights is unrelated to rates, services, and schedules is simply irreconcilable with this Court's precedents.

B. *Charas v. Trans World Airlines*

In 1998 – after *Morales* and *Wolens* but before *Rowe* – the Ninth Circuit heard en banc a set of consolidated cases asserting state law tort claims for physical injuries occurring during travel on a commercial flight. *See Charas*, 160 F.3d at 1261-62 (describing claims for injuries arising, inter alia, from falling luggage and a service cart collision). The Ninth Circuit once again struggled to read ADA preemption narrowly: "[W]e hold that Congress used the word

'service' . . . in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail . . . [and not] an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities." *Id.* at 1261, 1264. Reading *Wolens* selectively to focus on the Court's holding that "Congress did not intend to preempt common law contract claims," *id.* at 1264, while ignoring the finding of preemption for the fraud claims, the *Charas* court held that state law tort claims are likewise outside the scope of the ADA, because "[n]othing in the Act itself, or its legislative history, indicates that Congress had a clear and manifest purpose to displace state tort law in actions that do not affect deregulation in more than a peripheral manner." *Id.* at 1265 (internal quotation omitted).

Charas is part of a widely recognized and well-established conflict among the Circuits over the meaning of "relating to . . . services" in the ADA, with the vast majority of Circuits on the other side of the split. In 2000, Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas acknowledged the split in dissenting from denial of a petition for a writ of certiorari in *Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000). In *Duncan*, the Ninth Circuit concluded that the ADA does not preempt a claim challenging an airline policy allowing smoking on trans-Pacific flights, explaining that the case was directly controlled by the narrow definition of "services" adopted in *Charas*. *Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1115 (9th Cir. 2000). The Justices dissenting from the denial of certiorari

explained that they would have granted the petition because the courts of appeals "have taken directly conflicting positions on this question of statutory interpretation," and because "[r]esolution of this question would provide needed certainty to airline companies." *Duncan*, 531 U.S. at 1058 (O'Connor, J. dissenting). The dissenting Justices pointed to *Charas* and the Third Circuit's decision in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998) as examples of cases interpreting the term "services" in the ADA narrowly, in contrast to the broader readings of the Fourth, Fifth, and Seventh Circuits, *see Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998); *Hodges*, 44 F.3d at 336; *Travel All Over the World*, 73 F.3d at 1433. Three years later, the Eleventh Circuit also noted the split and specifically rejected the reasoning in *Charas*, explaining that it found "more compelling" the broader reading of the ADA's preemption clause adopted by the Fifth and Seventh Circuits. *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1256-57 (11th Cir. 2003).

Rowe decisively rejected the Ninth Circuit's reasoning in *Charas*. As numerous courts have now recognized, *Rowe* makes clear that the Ninth Circuit's analysis in *Charas* reflects a significant misunderstanding of what it means for a law to be related to airline deregulation under *Morales*, as well as this Court's rationale for exempting breach of contract claims in *Wolens*. *See, e.g., DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011) ("[T]his dispute has been super[s]eded by controlling Supreme Court case law – namely, by *Rowe*'s expansive treatment of the term 'service.' The weight of circuit court authority now favors the broader definition.")

(citation omitted); *Air Transport Assoc. of America v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008) ("*Charas*'s approach, we believe, is inconsistent with the Supreme Court's recent decision in *Rowe*."). Indeed, last year, the U.S. Department of Transportation submitted a Statement of Interest in a district court case, stating the Department's position that *Charas* conflicts with *Rowe* and now stands on "unstable ground." *Nat'l Fed'n of the Blind v. United Airlines, Inc.*, No. 10-4816, 2011 WL 1544524, at *5 (N.D. Cal. Apr. 25, 2011).

C. The Ninth Circuit Doubles (or Triples) Down: *Ginsberg v. Northwest*

In the decision below, the Ninth Circuit dug in its heels, expressly affirming and relying upon *West* and *Charas*, thus entrenching and perpetuating the already existing conflict between the Ninth Circuit's ADA jurisprudence and that of this Court and the vast majority of courts of appeals. Instead of recognizing *West*'s abrogation by *Wolens* and *Rowe*, the decision below declares *West* "still good law" requiring the conclusion that Ginsberg's implied covenant of good faith claim is "too tenuously connected" to airline regulation to trigger preemption. App. 14. Likewise, instead of recognizing *Charas*' abrogation by *Rowe*, the Ninth Circuit (although abbreviating its discussion of *Charas* when it amended its opinion) relied on *Charas* for the proposition that implied covenant of good faith claims are outside the scope of state laws that Congress intended the ADA to preempt. App. 14-17.

The decision below widens the gulf between the Ninth Circuit and the rest of the country by holding

that all implied covenant of good faith claims are exempt from ADA preemption, contrary to decisions by the vast majority of courts to address this issue. Relying on *Charas* and *West*, the decision adopts a blanket rule exempting "state-based common law contract claims, such as the implied covenant of good faith and fair dealing" from ADA preemption. App. 5. The First Circuit, in contrast, has specifically rejected a categorical preemption exemption for implied covenant of good faith claims. The plaintiffs in *Buck v. American Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007) sued several airlines seeking a refund of fees and taxes paid in the purchase of non-refundable tickets that were subsequently not used. The First Circuit found plaintiffs' implied covenant of good faith claim preempted by the ADA because it imposed state policies on the airline by relying on "implicit" contract terms not found in the agreement. *Id.* at 34-37. Similarly, in *Data Manufacturing, Inc. v. United Parcel Services*, 557 F.3d 849, 853-54 (8th Cir. 2009), the Eighth Circuit held preempted state law claims based on implied contractual obligations, including an implicit duty not to charge unlawful penalties, because such claims were not part of the agreement between the parties.

And the U.S. District Court for the Northern District of Illinois recently recognized "a direct conflict" between the decision below and Seventh Circuit precedent, explaining: "*Ginsberg* was decided in large part . . . on the conclusion that the implied covenant of good faith and fair dealing can never 'relate to' prices, routes or services. That holding appears to be in direct conflict with the Seventh Circuit's decision in *Travel All Over the World*, which

held that any contract claim can relate to price depending on the facts alleged." *Newman v. Spirit Airlines, Inc.*, No.12-2897, 2012 WL 3134422, *3-4 (N.D. Ill. July 27, 2012). *See Travel All Over the World*, 73 F.3d at 1432 n.8 (recognizing that under *Wolens*, "'some state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties'"); *see also* Jol A. Silversmith, *Federal Preemption Over Air Carrier Prices, Routes, and Services: Recent Developments*, 3 Air & Space L. 4, 6 (2012) (citing the *Ginsberg* decision for the proposition that "courts are divided as to whether claims based solely on the implied covenant of good faith and fair dealing are preempted" and noting that the Ninth Circuit "has taken an approach, relying on a narrow reading of the terms 'prices' and 'services,' that seemingly conflicts with Supreme Court decisions, as well as with other courts").

Consistent with the approach of the First, Seventh, and Eighth Circuits, numerous district courts have rejected plaintiffs' attempts to assert implied covenant of good faith claims by sheltering behind the *Wolens* preemption exception for breach of contract claims. *See, e.g., ATA Airlines, Inc. v. Fed. Express Corp.*, No. 08-0785, 2010 WL 1754164, *4 (S.D. Ind. April 21, 2010) (claims for breach of fiduciary duty and breach of duty of good faith and fair dealing "are preempted because the claims impose duties that are implied under state law and beyond the scope of the parties' agreements"); *Ray v. Am. Airlines, Inc.*, No. 08-5025, 2008 WL 2323923, *10 (W.D. Ark. June 2, 2008) ("Plaintiff's breach of contract claims which allege a breach of the implied

covenant of good faith and fair dealing based on Defendant's Customer Service Plan and Conditions of Carriage are preempted. The Supreme Court has held that the ADA 'confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.'" (quoting *Wolens*, 513 U.S. at 233)); *McMullen v. Delta Air Lines, Inc.*, No. 08-1523, 2008 WL 4449587, *5 (N.D. Cal. Sept. 30, 2008) (breach of implied covenant of good faith claim must be dismissed because "to the extent a plaintiff seeks to impose limits 'beyond those to which the parties actually agreed, the [implied covenant] claim is invalid. To the extent the implied covenant claim seeks simply to invoke terms to which the parties *did* agree, it is superfluous.'") (quoting *Harm v. Frasher*, 181 Cal. App. 2d 405, 417, 5 Cal. Rptr. 367 (1960)).

Finally, even beyond the more specific splits of authority when it comes to substantive results, the Ninth Circuit's methodological approach to ADA and FAAAA preemption is out of step with precedents from this Court and the other Circuits. Part of the Ninth Circuit's problem is its persistent and erroneous view that the ADA's preemption provision should be interpreted narrowly, despite this Court's repeated statements to the contrary. The decision below describes *Morales* as "cabin[ing] its holding to those laws that actually have a direct effect on rates, routes, or services," and going to "great lengths to make clear that its holding was narrow." *Morales*, however, repeatedly affirmed the breadth of the ADA's preemption language, stating that the clause "express[ed] a broad preemptive purpose," had a "sweeping nature," and was "broadly worded." 504

U.S. at 383-84. *Wolens* reiterated a broad construction of the ADA preemption clause, applying it to claims relating to "unessential," as well as "essential," services. 514 U.S. at 226. And *Rowe* affirms that a claim may have an effect that is "only indirect" on prices, routes, or services, and still be preempted. 552 U.S. at 370. As the First Circuit recently summarized: "All three of the major Supreme Court cases endorsed preemption and read the preemption language broadly and none adopted [the position] that we should presume strongly against preempting in areas historically occupied by state law." *DiFiore*, 646 F.3d at 86 (internal citation omitted).

III. This Court's Review is Necessary to Bring the Ninth Circuit's ADA Jurisprudence in Alignment with that of this Court and the Other Courts of Appeals and to Put an End to the Ninth Circuit's Frustration of Congress's Deregulation Efforts in the Airline and Transportation Industries

The decision below has widespread commercial ramifications in the aviation and transportation industries, much greater than the frequent flyer program at issue here. Each time a carrier acts pursuant to its express and unequivocal rights under a contract, it may be exposed to a state law claim for breach of an implied covenant of good faith. Airlines and other carriers must be able to rely and act on the standard terms in their self-undertaken contracts. The ADA and *Wolens* guarantee as much. Yet the Ninth Circuit's decision casts significant doubt on whether airlines can continue to rely on their standard contract terms without being subject to

extra-contractual claims and obligations. As Judge Rymer observed, "[t]he answer [to whether implied covenant of good faith claims are preempted] is important for airlines who otherwise may be required to defend contract actions under a variety of state laws whenever they enact changes in their frequent flyer programs." App. 40.

The Ninth Circuit's decision here provides a roadmap for avoiding this Court's ADA precedent by allowing a plaintiff to pursue a claim squarely foreclosed under a contract by labeling it a claim for breach of an implied covenant of good faith. The end run around *Wolens* is dramatically illustrated by Ginsberg's decision to drop his contract claim (which was effectively foreclosed by the contract's "sole judgment" language) and pursue the "implied covenant" theory to obtain what the express terms of the contract plainly did not provide. The decision entrenches and exacerbates an already existing split between the Ninth Circuit and the majority of other courts of appeals, and robs the industry of much of the protection conferred by Congress in the ADA.

But the conflict between the Ninth Circuit and this Court is about much more than whether the ADA preempts implied covenant of good faith claims. Over the last 20 years, the Ninth Circuit has repeatedly strayed from this Court's teaching about the ADA. While other courts have recognized that *Wolens* and *Rowe* abrogated the Ninth Circuit's decisions in *West* and *Charas*, the Ninth Circuit has dug in its heels and relied on those cases to reach results like the one here that would be inconceivable in other Circuits. At this point, it is as if the Ninth Circuit is speaking a

different language than the rest of the federal judiciary: While this Court and the other courts of appeals conduct an inquiry into the underlying allegations to determine whether the claim at issue (1) relies on the enactment or enforcement of state statutory or common law in a manner that (2) relates to airline rates, routes, or services, the Ninth Circuit is issuing sweeping declarations that entire categories of common law claims are unrelated to airline deregulation and do not implicate the "narrow" preemptive effect of the ADA. Indeed, in the decision below, the Ninth Circuit quite literally was asking the wrong question. Rather than focus on whether Ginsberg's "implied covenant" claim enlarged the parties' bargain based on state law (a question that could only be answered affirmatively), the Ninth Circuit focused on whether the claim related to rates and services (a question that was already answered affirmatively in *Wolens*). The decision below makes clear that the Ninth Circuit is deeply committed to its flawed approach to ADA preemption and will not align itself this Court and the rest of the courts of appeals without direct intervention by this Court.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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October 11, 2012

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-56986

S. BINYOMIN GINSBERG, Rabbi, an individual and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

NORTHWEST, INC., a Minnesota corporation and a wholly-owned subsidiary of Delta Air Lines, Inc.; DELTA AIRLINES, INC., a Delaware corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of California
D.C. No. 3:09-cv-00028-JLS-NLS
Janis L. Sammartino,
District Judge, Presiding

Argued and Submitted June 9, 2011
Pasadena, California

Filed July 13, 2012

Before: Mary M. Schroeder[1], Robert R. Beezer[2], and Stephen S. Trott, Circuit Judges.

Opinion by Judge Beezer

ORDER

The opinion filed August 5, 2011, slip op. 10231, and appearing at 653 F.3d 1033 (9th Cir. 2011), is hereby withdrawn. A new opinion is filed concurrently with this order.

The panel voted to deny defendants-appellees' petition for rehearing, and recommended denying the petition for rehearing en banc.

The full court has been advised of the new opinion and defendants-appellees' petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Defendants-appellees' petition for panel rehearing and petition for rehearing en banc are denied.

OPINION

Beezer, Circuit Judge:

Plaintiff brought suit against an airline alleging a common law breach of contract under the implied covenant of good faith and fair dealing. The district court held that Plaintiff's claim was preempted by

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[1] Following the death of Judge Rymer, Judge Schroeder has been drawn to replace her on the panel.

[2] Judge Beezer authored and approved the amended opinion before his death.

the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), and dismissed the claim pursuant to Fed. R. Civ. P. 12(b)(6). We conclude that the ADA does not preempt this common law contract claim, and reverse the district court.

When Congress passed the ADA, it dismantled a federal regulatory structure that had existed since 1958. By including a preemption clause, Congress intended to ensure that the States would not undo the deregulation with regulation of their own. Congress's "manifest purpose" was to make the airline industry more efficient by unleashing the market forces of competition—it was not to immunize the airline industry from liability for common law contract claims. Congress did not intend to convert airlines into quasi-government agencies, complete with sovereign immunity.

The purpose, history, and language of the ADA, along with Supreme Court and Ninth Circuit precedent, lead us to conclude that the ADA does not preempt a contract claim based on the doctrine of good faith and fair dealing.

Background

Plaintiff S. Binyomin Ginsberg was an active member of "WorldPerks," a frequent flier program offered by Defendant Northwest Airlines, Inc. ("Northwest"). Ginsberg began his WorldPerks membership in 1999, and by 2005 he had obtained Platinum Elite Status. Northwest revoked Ginsberg's WorldPerks membership on June 27, 2008. Ginsberg attempted several times to clarify the reasons behind Northwest's decision to revoke his membership.

Ginsberg alleges that Northwest revoked his membership arbitrarily because he complained too frequently about the services. Northwest sent Ginsberg an email on November 20, 2008, detailing the basis for Northwest's decision to revoke Ginsberg's membership. In that email the Northwest representative quotes from Paragraph 7 of the General Terms and Conditions of the World-Perks Program, which provides that Northwest may determine "in its sole judgment" whether a passenger has abused the program, and that abuse "may result in cancellation of the member's account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards."

Ginsberg initially filed suit on January 8, 2009, asserting four causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligent misrepresentation; and (4) intentional misrepresentation. Northwest moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the ADA preempted the claims. The district court dismissed, with prejudice, Ginsberg's claims for breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation, concluding that the ADA preempted them " 'because they relate to airline prices and services.' " The district court also dismissed the general breach of contract claim without prejudice, finding that the claim was not preempted, but that Ginsberg had failed to allege facts sufficient to show a material breach.

Ginsberg only appeals the district court's conclusion that the ADA preempts a claim for breach of the implied covenant of good faith and fair dealing.

Standard of Review

"Dismissals under Fed. R. Civ. P. 12(b)(6) for failure to state a claim are reviewed de novo." *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007).

Analysis

Based on our case law, Supreme Court precedent, and the ADA's legislative history and statutory text, we conclude that the ADA does not preempt state-based common law contract claims, such as the implied covenant of good faith and fair dealing. Although Ginsberg's claim may still fail on the merits, the district court erred when it dismissed the claim under the preemption doctrine. Doing so was a misapplication of the law because the ADA was never designed to preempt these types of disputes.

A. Preemption Doctrine

The key to understanding the scope of the ADA's preemption clause is to determine what Congress intended to achieve when it enacted the ADA. "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990) (internal quotation marks omitted). This inquiry "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative

purpose." *Id.* at 57 (internal quotation marks omitted).

In *Medtronic, Inc. v. Lohr*, the Supreme Court advised that preemption provisions ought to be narrowly construed for two reasons:

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action . . . Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment . . . that the purpose of Congress is the ultimate touchstone in every pre-emption case.

518 U.S. 470, 485 (1996) (internal quotation marks omitted).

Indeed, preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). When the question of preemption implicates "a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (internal citation and quotations omitted).

To determine what Congress's "manifest purpose" was, we must first consider the ADA's unique history. Under the Federal Aviation Act of 1958, the Civil Aeronautics Board ("CAB") had regulatory authority over interstate air

transportation. Pub. L. No. 85-726. But the Board's power in this field was not exclusive, for the statute also contained a "savings clause," clarifying that "[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506 (1964), amended and renumbered as 49 U.S.C. § 40120(c) by Pub. L. 103-272, 108 Stat. 745, 1118 (1994). Because the 1958 Act did not expressly preempt state law, this clause allowed states to regulate airlines, leading to economic distortions. *See, e.g., California v. CAB*, 581 F.2d 954, 956 (D.C. Cir. 1978) (concluding that states may regulate intrastate airfares, even if such regulations interfere with interstate prices).

By 1978 Congress had concluded that state-by-state regulation was inefficient and that deregulation, along with market forces, could better promote efficiency, variety, and quality in the airline industry. *See* H.R. Rep. No. 95-1779, at 53 (1978) (Conf. Rep). But seeing that states could just as easily "undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines Inc.*, 504 U.S. 374, 378 (1992), Congress included a preemption clause in former section 1305(a)(1), which now reads as follows:[3]

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[3] The clause was initially located in the ADA itself at 49 U.S.C. § 1305(a)(1), but was amended and incorporated into the Federal Aviation Administration Authorization Act of 1994. 49 U.S.C. § 41713(b).

> [A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

At the same time, Congress retained the "savings clause," thereby preserving common law and statutory remedies. Since 1978, the scope of this preemption clause has been hotly debated, but never fully resolved.

B. Supreme Court and Ninth Circuit Precedent

The Supreme Court has encountered the ADA's preemption clause at least three times since 1990. In *Morales*, the Court considered whether the ADA preempted the States "from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes." 504 U.S. at 378. The Court concluded that because advertising has such a direct link to pricing and rates, the ADA preempted restrictions against deceptive advertising. *Id.* at 388-89. The Court therefore reasoned that the advertising restrictions at issue had the "forbidden significant effect" on rates, routes, or services. *Id.* at 388. Because the regulations were inconsistent with the ADA's deregulatory purpose, they were preempted under former § 1305(a)(1). But in the next breath the Court cabined its holding to those laws that actually have a direct effect on rates, routes, or services.

The Court went to great lengths to make clear that its holding was narrow, and that the ADA only preempts laws that have a direct effect on pricing:

> In concluding that the . . . advertising guidelines are pre-empted, we do not . . . set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly "relate to" rates; the connection would obviously be far more tenuous . . . [S]ome state actions may affect airline fares in too tenuous, remote, or peripheral a manner to have a preemptive effect.

504 U.S. at 390 (internal citations omitted).

We echoed this view in *Air Transport Association of America v. City & County of San Francisco*, where we concluded that Congress did not intend for the ADA to preempt state laws forbidding employment discrimination, even if these laws have an economic effect, because employment discrimi- nation laws are not directly related to pricing, routes, or services. 266 F.3d 1064, 1072-73 (9th Cir. 2001).

The Court considered the ADA's preemption clause for a second time in *American Airlines, Inc., v. Wolens*, 513 U.S. 219 (1995). In a fact pattern similar to this case, the plaintiffs in *Wolens* were members of a frequent flyer program and brought suit against an airline. *Id.* at 224-25. The plaintiffs challenged

certain program modifications that devalued credits the members had already earned, and claimed that the devaluation constituted a breach of contract and a violation of Illinois's Consumer Fraud and Deceptive Business Practices Act. *Id.* The court concluded that § 1305(a)(1) clearly preempted the consumer fraud claim because it was a state-imposed regulation that related to the price, routes, or services of air carriers. *Id.* at 222. But the Court allowed the breach of contract claim to go forward, making clear that the ADA "allows room for court enforcement of contract terms set by the parties themselves." *Id.* "In so doing, the Court held that Congress did not intend to preempt common law contract claims." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1264 (9th Cir. 1998) (en banc) (discussing the scope of § 1305(a)(1) after the *Wolens* decision).

The Court in *Wolens* drew a clear distinction between the consumer fraud claim, which was based on a proscriptive law targeting *primary conduct*, and actions that "simply give effect to bargains offered by the airlines and accepted by airline customers." *Wolens*, 513 U.S. at 228. Because this distinction—between state laws that regulate airlines and state enforcement of contract disputes—is crucial, we quote the Court at length:

> We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings. As persuasively

argued by the United States, terms and conditions airlines offer and passengers accept are *privately ordered obligations "and thus do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of [§] 1305(a)(1).*" Brief for United States as *Amicus Curiae* 9. *Cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526, 112 S. Ct. 2608, 2612, 120 L. Ed. 2d 407 (1992) (plurality opinion) ("[A] common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . *imposed under State law*' within the meaning of [Federal Cigarette Labeling and Advertising Act] § 5(b).").

The ADA, as we recognized in *Morales* . . . was designed to promote "maximum reliance on competitive market forces." . . . Market efficiency requires effective means to enforce private agreements. See Farber, Contract Law and Modern Economic Theory, 78 Nw. U. L. Rev. 303, 315 (1983) (remedy for breach of contract "is necessary in order to ensure economic efficiency") . . . As stated by the United States: "The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on the needs perceived by the contracting parties at the time." Brief for United States as *Amicus Curiae* 23. That reality is key to sensible construction of the ADA.

Wolens, 513 U.S. at 228-30 (internal footnote omitted) (alterations in original) (emphasis added). In sum, the Court concluded that a state does not "enact or enforce any law" when it uses its contract laws to enforce private agreements.[4]

After drawing this distinction, the Court then pointed out institutional limitations that demonstrate the ADA cannot preempt breach of contract claims, including those based on common law principles such as good faith and fair dealing. In particular, the Department of Transportation is not equipped to adjudicate these types of claims. First, the DOT's own regulations "contemplate that . . . contracts ordinarily would be enforceable under 'the contract law of the States.'" *Wolens*, 513 U.S. at 230 (citing 47 Fed. Reg. 52129 (1982)). Second, the DOT is not equipped with either "the authority [or] the apparatus required to superintend a contract dispute resolution regime." *Id.* at 232. Although before 1978 the CAB adjudicated contract disputes, when Congress deregulated the airline industry it dismantled this apparatus and never replaced it.

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[4] Two concurrences in *Wolens* also provided insight into the Court's reasoning. Justice O'Connor wrote that "[m]any cases decided since *Morales* have allowed personal injury claims to proceed, even though none has said that a State is not 'enforcing' its 'law' when it imposes tort liability on an airline." 513 U.S. at 242 (O'Connor, Jr., concurring in the judgment in part, dissenting in part). And Justice Stevens emphasized that the ADA's preemption clause would not bar common law claims such as negligence or fraud. 513 U.S. at 235-36 (Stevens, J., concurring in part, dissenting in part).

Therefore, if common law contract claims were preempted by the ADA, a plaintiff literally would have no recourse because state courts would have no jurisdiction to adjudicate the claim, and the DOT would have no ability to do so. Effectively, the airlines would be immunized from suit—a result that Congress never intended. This also means that "the lawmakers indicated no intention to establish, simultaneously, a new administrative process for DOT adjudication of private contract disputes." *Id.* Consequently, the Court flatly refused to "foist on the DOT work Congress has neither instructed nor funded the Department to do." *Id.* at 234. We agree.

The Supreme Court considered § 1305(a)(1) for a third time in *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008). In *Rowe* a group of transport carrier associations challenged a Maine statute that regulated the shipment of tobacco into the state. *Id.* at 369. The Court concluded that the ADA preempted Maine's statute because the latter "produces the very effect that the federal law sought to avoid; namely, a State's direct substitution of its own governmental commands for 'competitive market forces.'" *Id.* at 372. Invoking *Morales*, the Court emphasized that "state enforcement actions having a connection with, or reference to carrier 'rates, routes, or service,' are pre-empted." *Id.* at 370 (quoting *Morales*, 504 U.S. at 384 (alteration omitted)). Indeed, compared to either *Wolens* or *Morales*, the link in *Rowe* was more directly related to "routes, rates, or services" because it regulated primary activity that fell under the ADA, thereby frustrating Congress's "manifest purpose" to deregulate the industry.

And finally, we addressed a similar question in *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993). There, the plaintiff brought suit against Northwest for breach of the covenant of good faith and fair dealing under Montana law. *Id.* at 149. The district court granted summary judgment to Northwest, stating that the claim was preempted by the ADA. On appeal we reversed, concluding that a claim for breach of the covenant of good faith and fair dealing was "too tenuously connected to airline regulation to trigger preemption under the ADA." *Id.* at 151. Although this case was pre-*Wolens*, we conclude it is still good law.

Indeed, in *Charas*, a post-*Wolens* decision, we emphasized that Congress's "clear and manifest purpose" in enacting airline deregulation "was to achieve just that—the economic deregulation of the airline industry." *Charas*, 160 F.3d at 1265. The only purpose of the preemption clause is to prevent state interference with the mandate of deregulation. *Id.* at 1261 (noting that when Congress enacted the ADA it "intended to preempt only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry.").

Additionally, that Congress did not intend for § 1305(a)(1) to preempt state common law contract claims is evident from another provision: the savings clause, which preserves common law remedies. Because the ADA's preemption clause does not explicitly preempt common law breach of contract claims, we turn to the rest of the statute's language to " 'ascertain and give effect to the plain meaning of

the language used,' but must be careful not to read the preemption clause's language in such a way as to render another provision superfluous." *Charas*, 160 F.3d at 1264 (quoting *Hughes Air Corp. v. Public Utils. Comm'n*, 644 F.2d 1334, 1337 (9th Cir. 1981)).

In *Charas* we concluded that, taken together, the savings clause and preemption clause "evidence [] congressional intent to prohibit states from regulating the airlines while preserving state tort remedies that already existed at common law, providing that such remedies do not significantly impact federal deregulation." *Id.* at 1265. Similar logic would apply to state contract remedies that already existed at common law, such as the implied covenant of good faith and fair dealing. *See Wolens*, 513 U.S. at 232-33 (explaining that the preemption clause, "read together with the . . . savings clause," would permit "state-law-based court adjudication of routine breach of- contract claims").

Moreover, we also may look to "the pervasiveness of the regulations enacted pursuant to the relevant statute to find preemptive intent." *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007). As the Supreme Court pointed out in *Wolens*, the DOT is not equipped to handle contract disputes, and its regulations suggest that Congress did not intend to occupy this particular field of law. This stands in contrast, for example, to airline safety, where agency regulations demonstrate "an intent to occupy exclusively the entire field of aviation safety." *Id.* at 471.

A claim for breach of the implied covenant of good faith and fair dealing does not interfere with the

deregulatory mandate. Although Northwest argues that a common law breach of contract claim, like one based on the doctrine of "good faith and fair dealing," would enlarge the contract's terms—savings clause, notwithstanding—the Supreme Court rejected this argument in *Wolens*. There, the Court explicitly allowed "state-law-based" claims to go forward because that was the purpose of retaining the savings clause. *Wolens*, 513 U.S. at 232. The Supreme Court reasoned that state-law-based contract claims would not frustrate the ADA's manifest purpose: "[b]ecause contract law is not at its core 'diverse, nonuniform, and confusing,' we see no large risk of nonuniform adjudication inherent in 'state-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide.'" *Id.* at 233 n.8 (internal citation and alteration omitted).

As we pointed out in *Air Transport Association of America v. City and County of San Francisco*, "[w]hat the Airlines are truly complaining about are free market forces and their own competitive decisions." 266 F.3d 1064, 1074 (9th Cir. 2001). In upholding a local law forbidding employment discrimination, the Ninth Circuit reasoned that "[i]n this deregulated environment, airlines can decide whether or not to make large economic investments at the San Francisco airport . . . That economic decision may mean the Airlines will have to agree to abide by the [city's anti-discrimination] Ordinance[ ]." *Id.* Similarly, here, Northwest is free to invest in a frequent flier program; however, that economic decision means that the airline has to abide by its contractual obligations, within this deregulated

context, pursuant to the covenant of good faith and fair dealing. Like the ordinance at issue in *Air Transport Association*, state enforcement of the covenant is not "to force the Airlines to adopt or change their prices, routes or services—the prerequisite for ADA preemption." *Id.*

C. The Implied Covenant of Good Faith and Fair Dealing Does Not "Relate to" Prices, Routes, or Services

Finally, the district court concluded that the ADA preempts Ginsberg's claim for breach of the covenant of good faith and fair dealing because the claim would "relate to" both "prices" and "services." We disagree.

First, the district court uses an overly broad definition of what relates to "prices." In *Wolens* all the justices—including the dissenters—agreed that the ADA does not preempt common law tort claims such as personal injury and wrongful death, even though airline costs and fares would be affected by how restrictive a particular state's law may be. *Wolens*, 513 U.S. at 234-35. Similarly, here, the link is far too tenuous, and effectively would subsume all breach of contract claims. *See All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161, 1171 (C.D. Cal. 2001) ("[C]laims must adversely impact economic deregulation of the airlines and the forces of competition within the airline industry in order to be preempted by the ADA . . . Allowing [the claims to proceed] will not have the effect of regulating American's pricing policies, commission structure or reservation practices.").

Second, the district court's broad understanding of the "relating to" language is also inconsistent with the ADA's legislative history. In 1977, the CAB's proposed preemption language stated that "[n]o State . . . shall enact any law . . relating to rates, routes, or services in air transportation." Hearings on H.R. 8813, Subcomm. on Aviation of the House Comm. on Pub. Works & Transp., 95th Cong., 1st Sess. pt. 1, p. 200 (1977). In its explanatory testimony the CAB's representatives never suggested that the "relating to" language created a broad scope for preemption. Rather, the CAB explained that the preemption clause was "added to make clear that no state or political subdivision may defeat the purposes of the bill by regulating interstate air transportation. This provision represents simply a codification of existing law and leaves unimpaired the states' authority over intrastate matters." *Id.* at 243.

The "relating to" language that Congress eventually enacted came from the House version of the bill. But in its Committee Report, the House also made clear that the preemption provision simply "provid[ed] that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates, or services." H.R. Rep. No. 95-1211, at 16 (1978). This understanding is more narrow than the district court's conclusion. And, in fact, the Senate's version did not even contain the "relating to" language at all. S. 2493, § 423(a)(1), *reprinted in* S. Rep. No. 95-631, p. 39 (1978). The Senate Report clarified that this section "prohibits States from exercising economic regulatory control over interstate airlines." *Id.* at 98. Finally, the Conference Report

adopted the House bill and its explanation, which it described in narrow terms. H.R. No. 95-1779, at 94-95 (1978) (Conf. Rep.). This history suggests that Congress intended the preemption language only to apply to state laws directly "regulating rates, routes, or services." The district court's broad reading of the statute's language simply finds no support in the legislative history.

Conclusion

Nothing in the ADA's language, history, or subsequent regulatory scaffolding suggests that Congress had a "clear and manifest purpose" to displace State common law contract claims that do not affect deregulation in more than a "peripheral . . . manner." *Morales*, 504 U.S. at 390. We conclude that a claim for breach of the implied covenant of good faith and fair dealing is not preempted by the ADA.

Accordingly, we REVERSE and REMAND to the district court to reconsider the merits of plaintiff's claim.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-56986

S. BINYOMIN GINSBERG, Rabbi, an individual and on behalf of all others similarly situated.

Plaintiff-Appellant,

v.

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Defendant-Appellee,

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Janis L. Sammartino, District Judge, Presiding

Argued and Submitted June 9, 2011
Pasadena, California

Filed August 5, 2011

Before: Robert R. Beezer, Stephen S. Trott, and Ann Rymer, Circuit Judges.

Opinion by Judge Beezer
Concurrence by Judge Rymer

OPINION

BEEZER, Circuit Judge:

Plaintiff brought suit against an airline alleging a common law breach of contract under the implied covenant of good faith and fair dealing. The district court held that Plaintiff's claim was preempted by the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), and dismissed the claim pursuant to Fed. R. Civ. P. 12(b)(6). We conclude that the ADA does not preempt this common law contract claim, and reverse the district court.

When Congress passed the ADA, it dismantled a federal regulatory structure that had existed since 1958. By including a preemption clause, Congress intended to ensure that the States would not undo the deregulation with regulation of their own. Congress's "manifest purpose" was to make the airline industry more efficient by unleashing the market forces of competition—it was not to immunize the airline industry from liability for common law contract claims. Congress did not intend to convert airlines into quasi-government agencies, complete with sovereign immunity.

The purpose, history, and language of the ADA, along with Supreme Court and Ninth Circuit precedent, lead us to conclude that the ADA does not preempt a contract claim based on the doctrine of good faith and fair dealing.

Background

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offered by Defendant Northwest Airlines, Inc. ("Northwest"). Ginsberg began his WorldPerks membership in 1999, and by 2005 he had obtained Platinum Elite Status. Northwest revoked Ginsberg's WorldPerks membership on June 27, 2008. Ginsberg attempted several times to clarify the reasons behind Northwest's decision to revoke his membership. Ginsberg alleges that Northwest revoked his membership arbitrarily because he complained too frequently about the services. Northwest sent Ginsberg an email on November 20, 2008, detailing the basis for Northwest's decision to revoke Ginsberg's membership. In that email the Northwest representative quotes from Paragraph 7 of the General Terms and Conditions of the World- Perks Program, which provides that Northwest may determine "in its sole judgment" whether a passenger has abused the program, and that abuse "may result in cancellation of the member's account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards."

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preempted them " 'because they relate to airline prices and services.' " The district court also dismissed the general breach of contract claim without prejudice, finding that the claim was not preempted, but that Ginsberg had failed to allege facts sufficient to show a material breach.

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Analysis

Based on our case law, Supreme Court precedent, and the ADA's legislative history and statutory text, we conclude that the ADA does not preempt state-based common law contract claims, such as the implied covenant of good faith and fair dealing. Although Ginsberg's claim may still fail on the merits, the district court erred when it dismissed the claim under the preemption doctrine. Doing so was a misapplication of the law because the ADA was never designed to preempt these types of disputes.

A. Preemption Doctrine

The key to understanding the scope of the ADA's preemption clause is to determine what Congress intended to achieve when it enacted the ADA. "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly

contained in its structure and purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990) (internal quotation marks omitted). This inquiry "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Id.* at 57 (internal quotation marks omitted).

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purpose of Congress." *Medtronic*, 518 U.S. at 485 (internal citation and quotations omitted).

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By 1978 Congress had concluded that state-by-state regulation was inefficient and that deregulation, along with market forces, could better promote efficiency, variety, and quality in the airline industry. *See* H.R. Rep. No. 95-1779, at 53 (1978) (Conf. Rep). But seeing that states could just as easily "undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines Inc.*, 504 U.S. 374, 378 (1992), Congress included a preemption

clause in former section 1305(a)(1), which now reads as follows:[1]

> [A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

At the same time, Congress retained the "savings clause," thereby preserving common law and statutory remedies. Since 1978, the scope of this preemption clause has been hotly debated, but never fully resolved.

B. Supreme Court and Ninth Circuit Precedent

The Supreme Court has encountered the ADA's preemption clause at least three times since 1990. In *Morales*, the Court considered whether the ADA preempted the States "from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes." 504 U.S. at 378. The Court concluded that because advertising has such a direct link to pricing and rates, the ADA preempted restrictions against deceptive advertising. *Id.* at 388-89. The Court

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[1] The clause was initially located in the ADA itself at 49 U.S.C. § 1305(a)(1), but was amended and incorporated into the Federal Aviation Administration Authorization Act of 1994. 49 U.S.C. § 41713(b).

therefore reasoned that the advertising restrictions at issue had the "forbidden significant effect" on rates, routes, or services. *Id.* at 388. Because the regulations were inconsistent with the ADA's deregulatory purpose, they were preempted under former § 1305(a)(1). But in the next breath the Court cabined its holding to those laws that actually have a direct effect on rates, routes, or services.

The Court went to great lengths to make clear that its holding was narrow, and that the ADA only preempts laws that have a direct effect on pricing:

> In concluding that the . . . advertising guidelines are pre-empted, we do not . . . set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly "relate to" rates; the connection would obviously be far more tenuous . . . [S]ome state actions may affect airline fares in too tenuous, remote, or peripheral a manner to have a preemptive effect.

504 U.S. at 390 (internal citations omitted).

We echoed this view in *Air Transport Association of America v. City & County of San Francisco*, where we concluded that Congress did not intend for the ADA to preempt state laws forbidding employment discrimination, even if these laws have an economic effect, because employment discrimination laws are

not directly related to pricing, routes, or services. 266 F.3d 1064, 1072-73 (9th Cir. 2001).

The Court considered the ADA's preemption clause for a second time in *American Airlines, Inc., v. Wolens*, 513 U.S. 219 (1995). In a fact pattern similar to this case, the plaintiffs in *Wolens* were members of a frequent flyer program and brought suit against an airline. *Id.* at 224-25. The plaintiffs challenged certain program modifications that devalued credits the members had already earned, and claimed that the devaluation constituted a breach of contract and a violation of Illinois's Consumer Fraud and Deceptive Business Practices Act. *Id.* The court concluded that § 1305(a)(1) clearly preempted the consumer fraud claim because it was a state-imposed regulation that related to the price, routes, or services of air carriers. *Id.* at 222. But the Court allowed the breach of contract claim to go forward, making clear that the ADA "allows room for court enforcement of contract terms set by the parties themselves." *Id.* "In so doing, the Court held that Congress did not intend to preempt common law contract claims." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1264 (9th Cir. 1998) (en banc) (discussing the scope of § 1305(a)(1) after the *Wolens* decision).

The Court in *Wolens* drew a clear distinction between the consumer fraud claim, which was based on a proscriptive law targeting *primary conduct*, and actions that "simply give effect to bargains offered by the airlines and accepted by airline customers." *Wolens*, 513 U.S. at 228. Because this distinction—between state laws that regulate airlines and state

enforcement of contract disputes—is crucial, we quote the Court at length:

> We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings. As persuasively argued by the United States, terms and conditions airlines offer and passengers accept are *privately ordered obligations "and thus do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of [§] 1305(a)(1).*" Brief for United States as *Amicus Curiae* 9. *Cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526, 112 S. Ct. 2608, 2612, 120 L. Ed. 2d 407 (1992) (plurality opinion) ("[A] common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . *imposed under State law*' within the meaning of [Federal Cigarette Labeling and Advertising Act] § 5(b).").
>
> The ADA, as we recognized in *Morales* . . . was designed to promote "maximum reliance on competitive market forces" . . . Market efficiency requires effective means to enforce private agreements. See Farber, Contract Law and Modern Economic Theory, 78 Nw.U.L.Rev. 303, 315 (1983) (remedy for breach of contract "is necessary in order to

> ensure economic efficiency") . . . As stated by the United States: "The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on the needs perceived by the contracting parties at the time." Brief for United States as *Amicus Curiae* 23. That reality is key to sensible construction of the ADA.

Wolens, 513 U.S. at 228-30 (internal footnote omitted) (alterations in original) (emphasis added). In sum, the Court concluded that a state does not "enact or enforce any law" when it uses its contract laws to enforce private agreements.[2]

After drawing this distinction, the Court then pointed out institutional limitations that demonstrate the ADA cannot preempt breach of contract claims, including those based on common law principles such as good faith and fair dealing. In particular, the Department of Transportation is not equipped to adjudicate these types of claims. First, the DOT's own regulations "contemplate that . . .

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[2]Two concurrences in *Wolens* also provided insight into the Court's reasoning. Justice O'Connor wrote that "[m]any cases decided since *Morales* have allowed personal injury claims to proceed, even though none has said that a State is not 'enforcing' its 'law' when it imposes tort liability on an airline." 513 U.S. at 242 (O'Connor, J., concurring in the judgment in part, dissenting in part). And Justice Stevens emphasized that the ADA's preemption clause would not bar common law claims such as negligence or fraud. 513 U.S. at 235-36 (Stevens, Jr., concurring in part, dissenting in part).

contracts ordinarily would be enforceable under 'the contract law of the States.' " *Wolens*, 513 U.S. at 230 (citing 47 Fed. Reg. 52129 (1982)). Second, the DOT is not equipped with either "the authority [or] the apparatus required to superintend a contract dispute resolution regime." *Id.* at 232. Although before 1978 the CAB adjudicated contract disputes, when Congress deregulated the airline industry it dismantled this apparatus and never replaced it. Therefore, if common law contract claims were preempted by the ADA, a plaintiff literally would have no recourse because state courts would have no jurisdiction to adjudicate the claim, and the DOT would have no ability to do so. Effectively, the airlines would be immunized from suit—a result that Congress never intended. This also means that "the lawmakers indicated no intention to establish, simultaneously, a new administrative process for DOT adjudication of private contract disputes." *Id.* Consequently, the Court flatly refused to "foist on the DOT work Congress has neither instructed nor funded the Department to do." *Id.* at 234. We agree.

The Supreme Court considered § 1305(a)(1) for a third time in *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008). In *Rowe* a group of transport carrier associations challenged a Maine statute that regulated the shipment of tobacco into the state. *Id.* at 369. The Court concluded that the ADA preempted Maine's statute because the latter "produces the very effect that the federal law sought to avoid; namely, a State's direct substitution of its own governmental commands for 'competitive market forces.'" *Id.* at 372. Invoking *Morales*, the Court emphasized that "state enforcement actions

having a connection with, or reference to carrier 'rates, routes, or service,' are pre-empted." *Id.* at 370 (quoting *Morales*, 504 U.S. at 384 (alteration omitted)). Indeed, compared to either *Wolens* or *Morales*, the link in *Rowe* was more directly related to "routes, rates, or services" because it regulated primary activity that fell under the ADA, thereby frustrating Congress's "manifest purpose" to deregulate the industry.

And finally, we addressed a similar question in *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993). There, the plaintiff brought suit against Northwest for breach of the covenant of good faith and fair dealing under Montana law. *Id.* at 149. The district court granted summary judgment to Northwest, stating that the claim was preempted by the ADA. On appeal we reversed, concluding that a claim for breach of the covenant of good faith and fair dealing was "too tenuously connected to airline regulation to trigger preemption under the ADA." *Id.* at 151. Although this case was pre-*Wolens*, we conclude it is still good law.

Indeed, in *Charas*, a post-*Wolens* decision, we emphasized that Congress's "clear and manifest purpose" in enacting airline deregulation "was to achieve just that—the economic deregulation of the airline industry." *Charas*, 160 F.3d at 1265. The only purpose of the preemption clause is to prevent state interference with the mandate of deregulation. *Id.* at 1261 (noting that when Congress enacted the ADA it "intended to preempt only state laws and lawsuits that would adversely affect the economic

deregulation of the airlines and the forces of competition within the airline industry.").

Additionally, that Congress did not intend for § 1305(a)(1) to preempt state common law contract claims is evident from another provision: the savings clause, which preserves common law remedies. Because the ADA's preemption clause does not explicitly preempt common law breach of contract claims, we turn to the rest of the statute's language to " 'ascertain and give effect to the plain meaning of the language used,' but must be careful not to read the preemption clause's language in such a way as to render another provision superfluous." *Charas*, 160 F.3d at 1264 (quoting *Hughes Air Corp. v. Public Utils. Comm'n*, 644 F.2d 1334, 1337 (9th Cir. 1981)).

In *Charas* we concluded that, taken together, the savings clause and preemption clause 'evidence[ ] congressional intent to prohibit states from regulating the airlines while preserving state tort remedies that already existed at common law, providing that such remedies do not significantly impact federal deregulation." *Id.* at 1265. Similar logic would apply to state contract remedies that already existed at common law, such as the implied covenant of good faith and fair dealing. *See Wolens*, 513 U.S. at 232-33 (explaining that the preemption clause, "read together with the . . . savings clause," would permit "state-law-based court adjudication of routine breach-of- contract claims").

Moreover, we also may look to "the pervasiveness of the regulations enacted pursuant to the relevant statute to find preemptive intent." *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007). As the

Supreme Court pointed out in *Wolens*, the DOT is not equipped to handle contract disputes, and its regulations suggest that Congress did not intend to occupy this particular field of law. This stands in contrast, for example, to airline safety, where agency regulations demonstrate "an intent to occupy exclusively the entire field of aviation safety." *Id.* at 471.

A claim for breach of the implied covenant of good faith and fair dealing does not interfere with the deregulatory mandate. Although Northwest argues that a common law breach of contract claim, like one based on the doctrine of "good faith and fair dealing," would enlarge the contract's terms—savings clause, notwithstanding—the Supreme Court rejected this argument in *Wolens*. There, the Court explicitly allowed "state-law-based" claims to go forward because that was the purpose of retaining the savings clause. *Wolens*, 513 U.S. at 232. The Supreme Court reasoned that state-law-based contract claims would not frustrate the ADA's manifest purpose: "[b]ecause contract law is not at its core 'diverse, nonuniform, and confusing,' we see no large risk of nonuniform adjudication inherent in 'state-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide.'" *Id.* at 233 n.8 (internal citation and alteration omitted).

As we pointed out in *Air Transport Association of America v. City and County of San Francisco*, "[w]hat the Airlines are truly complaining about are free market forces and their own competitive decisions." 266 F.3d 1064, 1074 (9th Cir. 2001). In upholding a

local law forbidding employment discrimination, the Ninth Circuit reasoned that "[i]n this deregulated environment, airlines can decide whether or not to make large economic investments at the San Francisco airport . . . That economic decision may mean the Airlines will have to agree to abide by the [city's anti-discrimination] Ordinance[ ]." *Id.* Similarly, here, Northwest is free to invest in a frequent flier program; however, that economic decision means that the airline has to abide by its contractual obligations, within this deregulated context, pursuant to the covenant of good faith and fair dealing. Like the ordinance at issue in *Air Transport Association*, state enforcement of the covenant is not "to force the Airlines to adopt or change their prices, routes or services—the prerequisite for ADA preemption." *Id.*

C. The Implied Covenant of Good Faith and Fair Dealing Does Not "Relate to" Prices, Routes, or Services

Finally, the district court concluded that the ADA preempts Ginsberg's claim for breach of the covenant of good faith and fair dealing because the claim would "relate to" both "prices" and "services." We disagree.

First, the district court uses an overly broad definition of what relates to "prices." In *Wolens* all the justices—including the dissenters—agreed that the ADA does not preempt common law tort claims such as personal injury and wrongful death, even though airline costs and fares would be affected by how restrictive a particular state's law may be. *Wolens*, 513 U.S. at 234-35. Similarly, here, the link

is far too tenuous, and effectively would subsume all breach of contract claims. *See All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161, 1171 (C.D. Cal. 2001) ("[C]laims must adversely impact economic deregulation of the airlines and the forces of competition within the airline industry in order to be preempted by the ADA . . . Allowing [the claims to proceed] will not have the effect of regulating American's pricing policies, commission structure or reservation practices.").

Second, the district court's broad understanding of the "relating to" language is also inconsistent with the ADA's legislative history. In 1977, the CAB's proposed preemption language stated that "[n]o State . . . shall enact any law . . . relating to rates, routes, or services in air transportation." Hearings on H.R. 8813, Subcomm. on Aviation of the House Comm. on Pub. Works & Transp., 95th Cong., 1st Sess. pt. 1, p. 200 (1977). In its explanatory testimony the CAB's representatives never suggested that the "relating to" language created a broad scope for preemption. Rather, the CAB explained that the preemption clause was "added to make clear that no state or political subdivision may defeat the purposes of the bill by regulating interstate air transportation. This provision represents simply a codification of existing law and leaves unimpaired the states' authority over intrastate matters." *Id.* at 243.

The "relating to" language that Congress eventually enacted came from the House version of the bill. But in its Committee Report, the House also made clear that the preemption provision simply "provid[ed] that when a carrier operates under

authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates, or services." H.R. Rep. No. 95-1211, at 16 (1978). This understanding is more narrow than the district court's conclusion. And, in fact, the Senate's version did not even contain the "relating to" language at all. S. 2493, § 423(a)(1), *reprinted in* S. Rep. No. 95-631, p. 39 (1978). The Senate Report clarified that this section "prohibits States from exercising economic regulatory control over interstate airlines." *Id.* at 98. Finally, the Conference Report adopted the House bill and its explanation, which it described in narrow terms. H.R. No. 95-1779, at 94-95 (1978) (Conf. Rep.). This history suggests that Congress intended the preemption language only to apply to state laws directly "regulating rates, routes, or services." The district court's broad reading of the statute's language simply finds no support in the legislative history.

Third, the district court's understanding of "services" is inconsistent with the our decision in *Charas*. In *Charas*, the en banc court considered the meaning of "services" in the wake of *Wolens*, and defined the term within the context of "rates" and "routes," to refer

> to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, "This airline provides service from Tucson to New York twice a day.")
>
> . . .

> Congress used "service" in § 1305(a)(1) in the public utility sense—i.e., the provision of air transportation to and from various markets at various times.

Charas, 160 F.3d at 1265-66. In *Charas* we also rejected the airlines' argument that "services" included fringe benefits such as the dispensing of food and drinks, or flight attendant assistance and explicitly warned against an expansive understanding. "To interpret 'service' more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does. It seems clear to us that that is not what Congress intended." *Id.* at 1266. The district court's understanding of "services" departs from this court's understanding of that term. A claim for breach of good faith and fair dealing does not relate to "services" because it has nothing to do with schedules, origins, destinations, cargo, or mail.

Conclusion

Nothing in the ADA's language, history, or subsequent regulatory scaffolding suggests that Congress had a "clear and manifest purpose" to displace State common law contract claims that do not affect deregulation in more than a "peripheral . . . manner." *Morales*, 504 U.S. at 390. We conclude that a claim for breach of the implied covenant of good faith and fair dealing is not preempted by the ADA.

Accordingly, we REVERSE and REMAND to the district court to reconsider the merits of plaintiff's claim.

RYMER, Circuit Judge, concurring in the judgment:

I join the court's holding because it is compelled by *West v. Northwest Airlines Inc.*, 995 F.2d 148 (9th Cir. 1993). There we determined that the plaintiff 's claim for breach of the covenant of good faith and fair dealing was not preempted because state contract law was "too tenuously connected" to airline prices and services. *See id.* at 151. Ginsberg similarly alleges a breach of the implied covenant of good faith and fair dealing. Thus, his claim survives preemption under *West*.

Whether *West* is "clearly irreconcilable" with *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), is a very close call. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). The Court, in *Wolens*, held that a breach of contract claim may relate to prices and services, depending on the facts alleged. *See* 513 U.S. at 226. The breach claim in that case related to prices and services because the alleged facts referenced ticket-pricing and access to flights. *Id. West*'s rule for contract claims seems out of step with the Supreme Court's holding. This rule also places us in tension with the Seventh Circuit. *See Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) ("*Morales* does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted by the ADA. Instead, we must examine the underlying facts of each case to determine whether the particular claims at issue 'relate to' airline rates, routes or services.").

That being said, the "clearly irreconcilable" requirement presents a high threshold, one I can't

say with certainty has been met here. *West*'s application of the "relates to" requirement was based on the interpretation provided in *Morales v Trans World Airlines, Inc.*, 504 U.S. 374 (1992). *See West*, 995 F.2d at 151. *Wolens* affirmed *Morales*'s interpretation of that clause. *See Wolens*, 513 U.S. at 226. As a three-judge panel, we are not free to disagree with *West*'s understanding of *Morales*, even if the later decision in *Wolens* suggests that *Morales*'s interpretation of "relates to" was broader than the *West* panel believed.

If *West* were not in the picture, we would be faced with the *Wolens* inquiry of whether Ginsberg's claim alleges a violation of a state-imposed obligation or a self-imposed undertaking. *See Wolens*, 513 U.S. at 228. This is a difficult question because, in some sense, an implied covenant of good faith represents both types of obligations. It is a covenant between the parties, suggesting a self-imposed undertaking, but is implied into the contract by the state, indicating a state-imposed obligation. The answer is important for airlines who otherwise may be required to defend contract actions under a variety of state laws whenever they enact changes in their frequent flyer programs. We need not resolve this difficulty today because of *West*'s insulation, at least for the time being, of state contract claims from ADA preemption.

Appendix C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 09-cv-28 JLS (NLS)

RABBI S. BINYOMIN GINSBERG,

Plaintiff,

v.

NORTHWEST, INC.; and DELTA AIR LINES, INC.,

Defendants.

Filed October 13, 2009

ORDER: DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Presently before the Court is Plaintiff's motion for reconsideration of the Court's Order of July 8, 2009. (Doc. No. 16.) For the reasons set forth below, Plaintiff's motion is DENIED.

BACKGROUND

On January 8, 2009, Plaintiff Rabbi S. Binyonmin Ginsberg filed a complaint against Defendants Northwest Airlines, Inc. ("Northwest") and Delta Air Lines, Inc. (Doc. No. 1.) Plaintiff alleged negligent and intentional misrepresentation, breach of good faith and fair dealing, and breach of contract against Defendants for actions Defendants

took in relation to Plaintiff's membership in Northwest's frequent flyer program, known as the WorldPerks Program ("WorldPerks"). On July 8, 2009, the Court granted Defendants' motion to dismiss Plaintiff's complaint. (Doc. No. 15 ("Order").)

On July 21, 2009, Plaintiff filed a motion for reconsideration of the Order. (Doc. No. 16.) On August 6, 2009 Defendants filed their opposition, (Doc. No. 23) and on August 13, 2009 Plaintiff filed

LEGAL STANDARD

"[A] postjudgment motion will be considered a [Federal Rule of Civil Procedure ("FRCP")] 59(e) motion where it involves reconsideration of matters properly encompassed in a decision on the merits." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989) (citation and quotation omitted). "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted). "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted).

ANALYSIS

Defendants correctly assert that Plaintiff's motion does not meet any requirements of Rule 59(e). (Opp. at 2-5.) Plaintiff brings forth no newly discovered evidence or changes in controlling law.

Rather than cite any clear errors by the Court, Plaintiff attempts to raise points of law he argued earlier. In the process he misstates the holding of the main case at issue, *America Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), and he brings no new arguments that could not reasonably have been brought in the initial litigation.

Nevertheless, the Court addresses Plaintiff's objections on the merits in the hope of resolving any confusion regarding its findings of law. Plaintiff objects that the Court (1) ignored the Airline Deregulation Act ("ADA") savings clause, (2) misconstrued the holding of the Supreme Court in *Wolens*, (3) improperly cited the regulatory authority of the Department of Transportation ("DOT"), (4) did not apply a "substantial effect" standard in finding Defendants' frequent flyer program related to airline rates, (5) erred in asserting that the covenant of good faith and fair dealing is a product of state policy, and (6) violated Plaintiff's constitutional rights to due process of law and equal protection.

I. Plaintiff's First Objection

Plaintiff asserts the Order "overextended the preemption doctrine in the ADA in contravention of the plain meaning of the ADA's savings clause." (Memo. ISO Motion, at 5.) The Supreme Court in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), explained why the ADA's preemption provision takes precedence over the savings clause:

> [I]t is a commonplace of statutory construction that the specific governs the general, a canon particularly pertinent here,

> where the "saving" clause is a relic of the pre-ADA/no pre-emption regime . . . As in *International Paper Co. v. Ouellette*, . . . "we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause."

Id. at 384-85 (citations and quotations omitted). Regarding agreements with customers, *Wolens* interpreted the savings clause to hold airlines to only "term[s] the airline itself stipulated." *Wolens*, 513 U.S. at 232-33. The preemption clause keeps the savings clause from creating any "enlargement or enhancement based on state laws or policies external to [an] agreement." *Id.* at 233. The Court's interpretation of the scope of the savings clause is consistent with the plain meaning of the more recent and specific ADA preemption provision and the plain meaning of two Supreme Court decisions. Under this clearly mandated view, the savings clause does not affect this Court's conclusion.

II. Plaintiff's Second and Fifth Objections

Plaintiff next objects that the Court has not in fact followed the plain meaning of the Supreme Court's decision in *Wolens*. He asserts that *Wolens* explicitly held common laws affecting contracts to not be preempted by the ADA. (Memo. ISO Motion, at 5-8.) This vision of *Wolens*, however, is at odds with the Supreme Court's decision which make no distinction between state common law and state statutes. Plaintiff further fails to understand that a common law doctrine exists independently of a contract itself and is a product of state policy. Both flaws are on display when Plaintiff claims that *Wolens* held

> claims [regarding a frequent flyer program] against an airline which were existing at common law before the ADA was passed, if dependent upon a contract and not based on a state statute, are preserved.

(Memo. ISO Motion, at 6.)

First, as stated above, *Wolens* makes no distinction between state statutes and state common law. Rather, the Supreme Court distinguished between terms an airline itself stipulates on the one hand, and *any* "enlargement or enhancement based on state laws or polices external to the agreement" on the other. *Wolens*, 513 U.S. at 233. In other words, it distinguishes between "state-imposed obligations" and "self-imposed undertakings" that are "confined to a contract's terms." *Id.* at 228-29. Nowhere in this discussion is there any suggestion that state common laws are somehow not "state-imposed obligations."

The second error in the above quotation is Plaintiff's implicit claim that there was no need for *Wolens* to state that the common law is not a "state-imposed obligation" because common law obligations automatically come into existence when parties agree to a contract.[1] In other words, Plaintiff tries to shoe-

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[1] Plaintiff's statement that "Justice Ginsberg allowed the common law claims in *Wolens* to proceed" is simply false. (Memo. ISO Motion, at 12.) All that remained after the Supreme Court's decision was a question of contractual interpretation: "Did American, by contract, reserve the right to change the value of already accumulated mileage credits, or only to change the rules governing credits earned from and after the date of the change?" *Wolens*, 513 U.S. at 233-35. This question of pure self-

horn his three common law claims into the exception provided by the *Wolens* Court—that airlines are bound to the terms of the contracts they enter—by claiming that the principles behind those claims are inherent in the terms of contracts. (*See* Memo. ISO Motion, at 12.) Plaintiff appears to believe that because state common laws are not written down in statutes, they must come to exist, even if not written down, when a contract is created. (*Id.*) But state common laws effecting contracts are not—as the *Wolens* court demands to avoid preemption—terms of the contract itself.[2] They are expansions beyond the explicit terms of the contract, as demonstrated by the fact that they apply regardless of whether the parties agree to them in the contract itself. They exist independently of the contract.

That is not to say that the common law exists as some "transcendental body of law." *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 534 (1928) (Holmes, J., dissenting). According to Plaintiff, the common law doctrine of good faith and fair dealing is a "normative term" in a contract that is "universally applied" and that is "just there." (Memo. ISO Motion, at 1 & 11 n. 8.) However, this doctrine "does not exist without some definite authority behind it. The common law so far as it is enforced in a State . . is not common law generally

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imposed contractual obligation had nothing to do with issues of good faith.

[2] Other than, of course, breach of contract, which is- and is alone- the *Wolens* exception. *Wolens*, 513 U.S. at 228-29.

but the law of that State existing by the authority of that State." *Black & White*, 276 U.S. at 533 (Holmes, J., dissenting). Thus, when applying this doctrine, the Court applies a state "law, regulation, or other provision having the force and effect of law," which is preempted by the ADA if it relates to an airline's prices, routes, or services. *See United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 610 (7th Cir. 2000) (common law claims relating to airline prices, routes, or services preempted by ADA); *All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161, 1169 (C.D. Cal. 2003) (same).

Neither can Plaintiff find refuge in his claim that the covenant of good faith and fair dealing is a self-imposed obligation of every contract. This position effectively reduces breach of contract and good faith into the same cause of action. Yet to the extent Plaintiff wishes simply to assert that Defendants breached an explicit term of WorldPerks, his good faith and fair dealing claim is not only preempted but fails on the ground—unchallenged by Plaintiff in his motion to reconsider—that Plaintiff has failed to allege any actual violation of the WorldPerks agreement. (*See* Order, at 9-11.)

If Plaintiff's good faith and fair dealing claim is in fact *not* based on Defendants' violation on a term of WorldPerks, it still fails. Under California law, the covenant of good faith and fair dealing "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 779 (9th Cir. 2003) (citing *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th

317 (2000)). Minnesota is similarly reticent about allowing the good faith doctrine to expand contracts beyond their explicit requirements. *See Larson v. Vermillion State Bank*, 567 N.W.2d 721, 723 (Minn. App. 1997); *cf. Leonard v. Northwest Airlines, Inc.*, 605 N.W.2d 425, 431 (Minn. App. 2000) (state public policies such as common law contract rule against penalties preempted by ADA because expands agreement of the parties). Thus, to the extent that Plaintiff seeks to get around the *Wolens* rule and expand the obligations of Defendants through the covenant of good faith and fair dealing, his claim is both preempted and invalid on its merits.

Given these substantial flaws in Plaintiff's reading of *Wolens* and his understanding of his common law claims, there is no reason to grant Plaintiff's motion based on these objections.

III. Plaintiff's Third Objection

Plaintiff objects that in the Order the Court improperly relied on the assumption that Plaintiff had a remedy with the DOT in reaching its conclusion. (Memo. ISO Motion, at 9.) He asserts that the DOT does not regulate frequent flyer matters. (*Id.*) However, the Court's mention of the DOT in a footnote had nothing to do with Plaintiff's remedies or lack thereof. (Order, at 7 n.4.) The point, rather, was that airlines are not immune from liability for improper actions. As *Wolens* stated:

> the DOT retains authority to investigate unfair and deceptive practices and unfair methods of competition by airlines, and may order an airline to cease and desist from

> such practices or methods of competition. See FAA § 411, 49 U.S.C. App. § 1381(a); *Morales*, 504 U.S. at 379.

Wolens, 513 U.S. at 228 n.4. Plaintiff cites no authority stating that the role of the DOT has changed since *Wolens* was decided. Further, if the Supreme Court was concerned that the DOT would not be sufficiently vigilant in supervising deceptive practices regarding frequent flyer programs, it could easily have said so, as a frequent flyer program was at issue in *Wolens*. *Id.* at 222. Given that it had no bearing on the resolution of Defendant's motion, Plaintiff's objections regarding the Court's tangential mention of the DOT in the Order are without merit.

IV. Plaintiff's Fourth Objection

Plaintiff objects that the Order wrongly concluded that his claims regarding WorldPerks related to airline rates. He concludes that *Wolens* held claims regarding frequent flyer agreements to be too tenuously related to prices to garner preemption. (Memo. ISO Motion, at 9 ("In the case of frequent flyer agreements, which *Wolens* held are so tenuous as not to have a connection to prices . . .").) Plaintiff further asserts that the Court needed to show not only that the claims "relate" to rates, but that the claims had a "substantial effect" on rates. (*Id.*, at 10.)

The holding in *Wolens* is the opposite of what Plaintiff claims. The Supreme Court found it patently obvious that tinkering with an airline's frequent flyer program through the enforcement of state laws would effect the prices charged by the airline. *Wolens*, 513

U.S. at 226. This result is not surprising, as the maintenance of a frequent flyer program obviously relates to the prices charged by an airline both to members of the program, who receive various forms of discounted service, and to non-members, whose purchases almost certainly support those discounts to some extent. See generally *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 741-42 (7th Cir. 1987) (Posner, J., concurring) (explaining that landlords will respond to a government ordinance that raises their costs by raising the rents they charge). Theoretical musings about the effect on price aside, the Supreme Court has spoken on this issue and this Court will follow that judgment.

Plaintiff's objection is also based on a misguided reading of *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007). He claims that to be preempted his claims must not only relate to prices, but have a "substantial effect" on them. (Memo. ISO Motion, at 10.) *Montalvo* created no such heightened requirement. The only use of a phrase even close to "substantial effect" in *Montalvo* is the statement that "Plaintiffs have not conceded that any seating reconfiguration [on a plane] would result in a significant effect on airline ticket prices." *Montalvo*, 508 F.3d at 475. The *Montalvo* court immediately moves on from this statement to apply the proper standard, asking "whether a seat reconfiguration would materially impact federal deregulation." *Id.* For a state law to "materially impact" deregulation (i.e. prices) does not require that the law have a "significant effect;" it requires merely that the law at issue affect rates "in more than a 'peripheral manner.'" *Charas v. Transworld Airlines, Inc.*, 160

F.3d 1259, 1265 (9th Cir. 1998) (citing *Morales*, 504 U.S. at 390). The claims in this case relate to rates in more than a "peripheral manner," as the Supreme Court made abundantly clear when it stated of a frequent flyer program in *Wolens*: "Plaintiff's claims relate to 'rates,' *i.e.*, [Defendant airline's] charges in the form of mileage credits for free tickets and upgrades." *Wolens*, 513 U.S. at 226.

V. Plaintiff's Sixth Objection

Plaintiff asserts that his right to equal protection under the 14th Amendment and right to due process under the 5th Amendment have been violated by the Court's Order. (Memo. ISO Motion, at 18.) He claims that the Order was "over inclusive" and deprived him of his "contract rights and property rights." (*Id.*)

In support of this claim, Plaintiff cites *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 62-64 (2002), a case in which the Supreme Court ruled that the preemption provision of the Federal Boat Safety Act of 1971 does not preempt state common law tort claims. Although *Spreitsma* involved questions of preemption, it is of limited utility because entirely different law was under consideration which involved different preemption language. *Compare id.* at 63 (referring to "'a [state or local] law or regulation'") *with Wolens*, 513 U.S. at 222-23 ("'[N]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . '") The controlling decision in this case is *Wolens*, which found preemption under the ADA even in light of the savings clause.

Plaintiff next asserts his 14th Amendment right to equal protection was violated because this Court "deprive[d] him of exactly what the *Wolens* plaintiffs received." (Memo. ISO Motion, at 18.) The Court is not entirely sure of the precise thrust of Plaintiff's argument. If he means that in *Wolens* not all of the plaintiff's claims were dismissed, whereas in the instant case all have been, this difference is attributable to the fact that in *Wolens* the plaintiffs successfully stated a claim for breach of contract. *Wolens*, 513 U.S. at 234. In contrast, Plaintiff in this case has yet to allege a term of WorldPerks that Defendants plausibly could have breached.

Finally, in his reply Plaintiff asserts that his fundamental rights were adversely affected while "the fundamental rights of other parties contracting with Defendants are not affected." (Reply, at 7.) Although Plaintiff's argument is meritless on its face, the Court need not address it because it was raised for the first time in Plaintiff's reply. *See, e.g., Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (a district court does not abuse its discretion by not considering an argument raised for the first time in a reply brief). None of Plaintiff's constitutional objections have merit to warrant reconsideration of this Court's prior order.

VI. Plaintiff's "Fifty Cases"

Towards the end of the motion for reconsideration, Plaintiff claims "[t]here are more than fifty reported decisions where Federal Courts have not pre-empted state contract claims that were less uniformly grounded than on an iron rule of law." (Memo. ISO Motion, at 14 (quotation marks

omitted).) Plaintiff does not explain what he means by "uniformly grounded," but appears to infer that the listed cases must all support not preempting the claim under the implied covenant of good faith. (Id.)

None of these cases meaningfully advances Plaintiff's position. Some of the cases, including *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), which Plaintiff claims to be the "most enlightening" case on the list, are examples of a claim not being preempted because it alleged breach of a contract term voluntarily agreed to by an airline, *i.e.* an example of the *Wolens* exception. *See, e.g., id.* at 1432 (claim that airline breached the explicit terms of "its agreement . . . to honor the confirmed reservations of [the plaintiff's] clients"); *In re Jetblue Airways Corp. Privacy Litigation*, 379 F. Supp. 2d 299, 316-17 (E.D.N.Y. 2005) (breach of contract claims not preempted by ADA). Others are cases in which state common law claims were not preempted because they did not relate to airline prices, routes, or services. *See e.g. West v. Northwest Airlines, Inc.*, 995 F.2d 148, 151-52 (9th Cir. 1993); *see also* Order at 7 (addressing fallacy of citing *West* to support Plaintiff's claims).[3] Several

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[3] This explanation why *West* does not support Plaintiff also explains why the amended order analyzed by Plaintiff in his reply, *Aloha Airlines, Inc. v. Mesa Air Group, Inc.*, CV 07-00007 DAE (D. Haw. Apr. 2, 2007) is unsupportive. (Reply at 4-5). *Aloha*, like *West*, based its holdings on the finding that the claims at issue did not relate to prices, routes, or services. Here, Plaintiff's preempted claims relate to prices. Further, any complaint about this Court's failure to cite to the amended order

of the cases listed in fact cut directly against Plaintiff. *See e.g. Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 756-57 (Tex. 2003) ("A state's common law [claims for misrepresentation and fraud] cannot operate against an airline . . . when it would constitute state enforcement of a law relating to airline services.") Finally, Plaintiff's "iron rule of law" assertion is a non sequitur that lends him no support.[4] The relevant issue is not how widespread or "iron" a law is, it is whether a claim under that law is a state imposed enlargement or enhancement of the contract that relates to airline prices, routes or services.

The Court reiterates that Plaintiff's breach of contract claim is not preempted. To the extent that Plaintiff wishes to enforce the "self-imposed undertakings" contained in the contract's terms, he is entirely free to do so. *Wolens*, 513 U.S. at 228. However, to the extent that Plaintiff seeks redress for breach of the implied covenant of good faith and fair dealing, its preemption, as an "enlargement or enhancement based on state laws or policies external to the agreement," is clear. *Id.* at 233.

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in *Aloha* is de minimis. The amendments did not alter the opinion's substance.

[4] Plaintiff goes on at length about the "iron rule" nature of the covenant of good faith and fair dealing. (Memo. ISO Motion, at 11-14). Plaintiff emphasizes that certain common law "iron rules" apply to all parties when creating contracts. Yet no explanation is given why a common law doctrine having widespread effect over citizens means Congress cannot write a law preempting such a doctrine in limited circumstances.

CONCLUSION

For the reasons stated, Plaintiff's motion for reconsideration is DENIED. Plaintiff MAY FILE an amended complaint within fourteen days of the date this order is electronically docketed.

IT IS SO ORDERED.

DATED: October 13, 2009.

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Honorable Janis L. Sammartino
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 09-cv-28 JLS (NLS)

RABBI S. BINYOMIN GINSBERG,

Plaintiff,

v.

NORTHWEST, INC.; and DELTA AIR LINES, INC.,

Defendants.

Filed July 8, 2009

Presently before the Court is Defendant's motion to dismiss the complaint. (Doc. No. 7.) The Court also has before it Plaintiff's opposition (Doc. No. 11) and Defendant's reply. (Doc. No. 14.) For the reasons set forth below, Defendant's motion is GRANTED and this action is DISMISSED WITH PREJUDICE IN PART and WITHOUT PREJUDICE IN PART.

BACKGROUND

Plaintiff Rabbi S. Binyomin Ginsberg is a resident of Minnesota and was a member of the frequent flier program offered by Defendant Northwest Airlines, Inc., the WorldPerks Program

(WorldPerks), between 1999 and 2008. (Compl. ¶¶ 1, 12.)[1] In June 2008 Plaintiff was informed by Defendant Northwest that his "Platinum Elite" status under WorldPerks was being revoked. (*Id.* ¶ 14.) Plaintiff received a letter from a Northwest representative dated July 18, 2008 which stated in part:

> It has been brought to my attention that you have contacted our office 24 times since December 3, 2007 regarding travel problems, including 9 incidents of your bag arriving late at the luggage carousel . . .
>
> Since December 3, 2007, you have continually asked for compensation over and above our guidelines. We have awarded you $1,925.00 in travel credit vouchers, 78,500 WorldPerks bonus miles, a voucher extension to your son, and $491.00 in cash reimbursements. . .
>
> Due to our past generosity, we must respectfully advise that we will no longer be awarding you compensation each time you contact us.

(Compl. Ex. A.) After several attempts by Plaintiff to get a more clear explanation for Defendant Northwest's revocation, Plaintiff received an email from the same Northwest representative on

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[1] For purposes of this motion, all of the facts alleged in the complaint are taken as true. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2011).

November 20, 2008. (*Id.* ¶ 28.) This email directed Plaintiff to Rule 7 of the terms and conditions of WorldPerks, which states in part:

> Abuse of the WorldPerks program (including failure to follow program policies and procedures, the sale or barter of awards or tickets and any misrepresentation of fact relating thereto or other improper conduct as determined by Northwest in its sole judgment, including, among other things, violation of the tariffs of Northwest. . . any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees' instructions) may result in cancellation of the member's account and future disqualification from program participation, forfeiture of mileage accrued and cancellation of previously issued but unused awards.

(*Id.*, Compl. Ex. B, C.)

Plaintiff filed this suit against Northwest and Delta on January 8, 2009 on behalf of himself and all other similarly situated WorldPerks members. (Compl.) Plaintiff prays for relief based on four causes of action: [1] breach of contract due to the revocation of Plaintiff's "Platinum Elite" status without valid cause (*Id.* ¶ 49); [2] breach of the duty of good faith and fair dealing due to Defendants' actions in contravention of the reasonable expectations of Plaintiff (*Id.* ¶ 56); [3] negligent misrepresentation based on the claims made by Northwest in its press release and web

announcement prior to termination of Plaintiff's "Platinum Elite" status (*Id.* ¶ 63); and [4] intentional misrepresentation, also based on the press release and web announcement made prior to termination of Plaintiff's "Platinum Elite" status (*Id.* ¶ 70-71.)

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) permits courts to dismiss a complaint for two reasons: (1) lack of a cognizable legal theory or (2) pleading of insufficient facts under an adequate theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984). In reviewing the Rule 12(b)(6) motion to dismiss, the Court must assume the truth of all factual allegations and construe inferences in the light most favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). While the complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). That is, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Associated Gen. Contractors of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (quoting *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998)). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the

complaint are true (even if doubtful in fact)." *Bell Atl.*, 550 U.S. at 555 (citations omitted).

Where a motion to dismiss is granted, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, the Court may deny leave to amend where amendment would be futile. *See id.*; *Schreiber Distrib.*, 806 F.2d at 1401.

ANALYSIS

Plaintiff argues that the language of Rule 7 of WorldPerks is vague, leaving a reasonable WorldPerks member unable to tell what is required to comply with it. (Compl. ¶¶ 29, 30.) Plaintiff further asserts that his complaints were all legitimate, and that the revocation of his "Platinum Elite" status was "nothing more than a pretext for cost-cutting" due to a merger between Defendant Northwest and Delta Air Lines, Inc. (Delta), which is also named as a Defendant in the complaint. (*Id.* ¶¶ 32, 39.) Because Northwest in a press release and on its website claimed that the merger between Northwest and Delta would not cause any changes to WorldPerks, Plaintiff asserts that termination of his "Platinum Elite" status for purposes of cost-cutting due to the merger means that the press release and web announcement amount to misrepresentation. (*Id.* ¶¶ 10-11, 63.)

Plaintiff's claims for breach of the duty of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation are preempted under the Airline Deregulation Act because they relate to airline prices and services. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995). Therefore these claims must be dismissed. Further, although Plaintiff's claim for breach of contract is not preempted, Plaintiff fails to identify a material breach of the agreement between he and the Defendants. Thus, it is also subject to dismissal.

I. Preemption of State Law Claims Under the ADA

The Airline Deregulation Act (ADA) was passed by Congress in 1978 "to encourage, develop, and attain an air transportation system which relies on competitive market forces." See 92 Stat. 1705. In order to prevent States from "undo[ing] federal deregulation with regulation of their own," a preemption clause was included in the ADA that bars States from enforcing any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . ." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992); 49 U.S.C. § 41713(b)(1).[2]

To be preempted under the preemption clause of the ADA, a claim (1) must require the enforcement of

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[2] Until 1994, when it was amended and incorporated into the Federal Aviation Administration Authorization Act of 1994, § 41713(b)(1) was codified as 49 U.S.C. app. § 1305(a)(1).

state law, and (2) it must relate to airline prices, routes, or services "either by expressly referring to them or by having a significant economic effect upon them." *All World Professional Travel Services, Inc. v. American Airlines, Inc.*, 282 F.Supp.2d 1161, 1168 (C.D. Cal. 2003) (quoting *Chrissafis v. Cont'l Airlines, Inc.*, 940 F.Supp. 1292, 1297 (N.D.Ill.1996)); *see also Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir.1996).

A. The Claim must Derive from the Enactment or Enforcement of State Law

Plaintiff's claims for breach of the duty of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation require the enforcement of state laws under the ADA.

The Supreme Court has twice interpreted the breadth of the preemption clause of the ADA. *Morales*, 504 U.S. 374; *Wolens*, 513 U.S. 219. Both decisions strongly suggest that state common law claims are laws, regulations, or "other provision[s] having the force and effect of law" which satisfy the first requirement for ADA preemption.

In *Morales* the Supreme Court held enforcement of state fare advertising guidelines preempted by the ADA. Although the Court did not systematically address what counts as a state law, regulation, or "other provision," it found the case analagous to an earlier Supreme Court decision in which common law causes of action were held preempted under a different provision using similar language. *Morales*, 504 U.S. at 388 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (holding common law breach of contract and fraud in the inducement claims

preempted by Employee Retirement Income Security Act of 1974 (ERISA)); *See also, Wolens*, 513 U.S. at 238 (O'Connor, J., concurring in part and dissenting in part) (reiterating the similar broad language in ADA and ERISA preemption provisions). The Court also noted that preemption of state law does not give airlines the freedom "to lie and deceive customers" through advertisements because the Department of Transportation (DOT) has the authority to prohibit potentially fraudulent or misleading airline ads. *Morales*, 504 U.S. at 390-91. Had the Court believed common law claims to be another tool available to combat fraudulent or misleading airline advertising it surely would have mentioned them.

More recently, *Wolens* held that while state standards relating to airline prices, routes, or services are preempted by the ADA, contract terms which an "airline itself stipulated" can be enforced. *Wolens*, 513 U.S. at 232-33. The Court stated that:

> This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

Id.

Plaintiff asserts that the only distinction between his misrepresentation claims and the claims made in *Wolens* is that the latter were derived from a state fraud statute while the former are derived from state common law; this is precisely why Plaintiff's two misrepresentation claims are preempted by the

ADA. (Opp., at 7-8.) As Judge Easterbrook puts it, "*Wolens* held that [the ADA preemption clause] preempts state anti-fraud statutes as applied to air carriers' rates, routes, and services; just so with common-law rules against fraudulent inducement." *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 610 (7th Cir. 2000) (citation omitted). This is because state common law causes of action are "other provision[s] having the force and effect of law" under the ADA preemption clause. *Id.* at 607. Several District Courts in the Ninth Circuit have adopted Judge Easterbrook's analysis and conclusions. *SVT Corp. v. Federal Exp. Corp.*, No. C-94-3057MHP, 1997 WL 285051, *4-5 (N.D. Cal. May 19, 1997) (finding state common law claims preempted by ADA), *aff'd*, 156 F.3d 1238 (9th Cir.1998); *McMullen v. Delta Air Lines, Inc.*, No. 08-1523 JSW, 2008 WL 4449587, *5 (N.D. Cal. Sept. 30, 2008) (same); *All World Prof'l Travel Services, Inc. v. American Airlines, Inc.*, 282 F.Supp.2d 1161, 1169 (C.D. Cal. 2003) (enforcement of common law claims preempted by ADA because they "would enhance the parties' bargain based on state policy"). The Court finds the reasoning of the Seventh Circuit and the Northern and Central Districts of California persuasive. Since the purpose of the ADA is economic deregulation of air carriers, if a state statute can be preempted for frustrating this purpose it is illogical that a state common law claim which produces an identical result should nevertheless be permitted.

Plaintiff's claim under the implied covenant of good faith and fair dealing fairs no better. His assertion that "[E]very contract imposes upon each party a duty of good faith and fair dealing," (Opp., at

8) (quoting *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, 826 P.2d 710, 2 Cal.4th 342, 371-72 (Cal. 1992)) misses that this duty does not appear *ex nihilo*,[3] and is not imposed by the contract itself (unless it so stipulates). Rather, it is implied by state law. *See McMullen v. Delta Air Lines, Inc.*, No. 08-1523 JSW, 2008 WL 4449587, *5 (N.D. Cal. Sept. 30, 2008) (implied covenant of good faith and fair dealing is a product of state law that is preempted by ADA because it "expands agreement of the parties"); *Power Standards Lab, Inc. v. Federal Exp. Corp.*, 127 Cal.App.4th 1039, 1046 (Cal. Ct. App. 2005). As noted above, according to the plain language of the ADA preemption clause, it is immaterial whether what a state commands is written down as a statute. 49 U.S.C. § 41713(b)(1) (state cannot enforce any "law, regulation, or *other provision having the force and effect of law*") (emphasis added). That parties must act in good faith and deal fairly with one another is a requirement of state policy, external to the contract itself, that is given "the force and effect of law." Such provisions can be preempted by the ADA if they relate to an airline's prices, routes, or services.[4]

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[3] Defined by Merriam-Webster Dictionary as "from or out of nothing."

[4] That good faith and fair dealing claims can be preempted does not, as Plaintiff claims, give airlines an ability to "avoid all liability." (Opp., at 5.) *Morales* makes clear that airlines remain subject to DOT supervision, and under *Wolens* they are subject to the explicit terms stated within the four corners of the contracts they enter. *Morales*, 504 U.S. at 390-91; *Wolens*, 513

It is crucial to keep separate the two requirements for ADA preemption: *whether a claim invokes state law* versus *whether a claim relates to an airline's prices, routes, or services.* Plaintiff points out that our Court of Appeals in *West v. Northwest, Inc.*, 995 F.2d 148 (9th Cir. 1993), held a claim based on breach of good faith and fair dealing to not be preempted by the ADA, and then proceeds to argue based on this decision that all good faith and fair dealing claims are not preempted. (Opp., at 8.) But Plaintiff reaches his conclusion by conflating the two requirements for preemption. The Ninth Circuit's reason in *West* for finding no ADA preemption was not that claims for breach of good faith and fair dealing are not state law; it was that claims involving overbooking of flights are too tenuously connected to an airline's prices, routes, or services. *West*, 995 F.2d, at 151-52. Following *West*, several Ninth Circuit district courts have continued to treat good faith and fair dealing claims as state law under the ADA. *See, e.g., Aloha Airlines, Inc. v. Mesa Air Group, Inc.*, F.Supp.2d, 2007 WL 842064, *7-*9 (D. Haw. Mar. 19, 2007); *McMullen v. Delta Air Lines, Inc.*, No. 08-1523 JSW, 2008 WL 4449587, *5 (N.D. Cal. Sept. 30, 2008).

As such, the Court finds that Plaintiff's claims for breach of the duty of good faith and fair dealing, negligent misrepresentation, and intentional

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U.S. at 232-33; *see also, McMullen v. Delta Air Lines, Inc.*, No. 08-1523 JSW, 2008 WL 4449587, *5 (N.D. Cal. Sept. 30, 2008).

misrepresentation are applications of state law under the ADA.

B. The Claim must Relate to Airline Rates, Routes, or Services

Plaintiff's claims also relate to both the "prices" and "services" of an air carrier as those terms are used in the ADA. In order to interpret the second requirement for ADA preemption—that the claim be "related to a price, route, or service of an air carrier"—the Supreme Court's decisions in *Morales* and *Wolens* provide the starting point. In Morales the Court held that advertising guidelines for airlines "quite obviously" relate to prices. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 387 (1992). The Court more generally held that the terms "related to" "express a broad pre-emptive purpose." *Id.* at 385. It held that the ADA preempts more than just statues explicitly regulating airlines, but does not include state actions too "tenuous, remote, or peripheral. . . to have pre-emptive effect." *Id.* at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100, n. 21).

In *Wolens* the Supreme Court ruled that the application of a state fraud statute to an airline's frequent flier program relates to airline "prices" and "services." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995). The language of that opinion suggests that preemption regarding the frequent flier program was not a close question. *Id.* ("We need not dwell on the question whether plaintiffs' complaints state claims 'relating to [air carrier] rates, routes, or services.'").

With neither *Morales* or *Wolens* providing a clear test of what is "related to a price, route, or service" under the ADA, the Court looks to the Ninth Circuit, which has defined "service" narrowly.[5] In *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998), the court held that the legislative history of the ADA does not support interpreting "service" to include "the dispensing of food and drinks, flight attendant assistance, or the like." *Id.* at 1265-66. "Service" was instead defined as referring to "the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." *Id.*; *See also Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1115 (9th Cir. 2000) (allowing smoking on a flight not a "service"). The Ninth Circuit has also shown reluctance to read "price" broadly. *See Montalvo v.*

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[5] The Courts of Appeals have disagreed over how broadly "related to" should be read, especially regarding airline "service." This Circuit and the Third Circuit have adopted a narrow definition, while the Fourth, Fifth, and Seventh Circuits have all adopted broader definitions. *Compare Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265-66 (9th Cir. 1998), *and Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 194 (3rd Cir. 1998) (whether cause of action hinders airline competition trumps consideration of whether airline activity is a "service" for purposes of determining preemption) *with Hodges v. Delta Airliens, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (including "ticketing, boarding procedures, provision of food and drink, and baggage handling" as "services"); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998) (holding boarding procedures to be a "service"); *and Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) (following *Hodges* definition of "service").

Spirit Airlines, 508 F.3d 464 (9th Cir. 2007) (remanding claim because court unable to determine if seat configuration on plane relates to "price" under ADA).

In the instant case there is no question that Plaintiff's claims relate to both airline "prices" and "services." For the Supreme Court in *Wolens* made abundantly clear that a frequent flier program relates to "prices" and "services," and the WorldPerks program at issue here is none other than a frequent flier program. *Wolens*, 513 U.S. at 226. If the Supreme Court "need not dwell" on this issue, then neither does this Court.

Because Plaintiff's claims for breach of the covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation require the enforcement of state law and relate to both airline prices and services, all are preempted by the ADA.

II. Breach of Contract

The *Wolens* decision held that the ADA does not preempt complaints claiming that an airline breached terms of a contract the airline "itself stipulated." 513 U.S. at 232-33. Plaintiff's claim that Defendants breached the express terms of the WorldPerks agreement is therefore not preempted by the ADA. Nonetheless, the Court must consider whether Defendants violated the WorldPerks agreement entered into with Plaintiff, but must do so "with no enlargement or enhancement [of the contract] based on state laws or policies external to the agreement." *Id.*

The inquiry into whether Plaintiff's complaint is adequate must begin with a determination of which state's law applies in this case. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Because Plaintiff filed this complaint in California, California's choice of law rules apply. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). In California: "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Cal. Civ. Code § 1646; *see ABF Capital Corp. v. Berglass*, 130 Cal.App.4th 825 (Cal. Ct. App. 2005) (citing *Restatement. 2d, of Conflict of Laws § 188(2)*) (If no choice of law made by the parties, court is to consider "the place at which the parties made the contract . . . the place of the contract's performance, the location of the contract's subject matter and . . . the residence, place of incorporation and place of business of the parties"). Plaintiff, a resident of Minneapolis, appears to fly in and out of Minnesota, and Defendant Northwest's principle place of business is Minnesota. (Compl. ¶¶ 2, 12-13.) Therefore, Minnesota law applies.

In Minnesota the interpretation of a contract is a question of law. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). The goal of interpretation is to determine the intent of the parties entering into the agreement, and "[w]here there is a written instrument, the intent of the parties is determined from the plain language of the instrument itself." *Id.* The Minnesota Supreme Court "[has] consistently stated that when a contractual provision is clear and unambiguous, courts should

not rewrite, modify, or limit its effect by a strained construction." *Id.* (citing *Telex Corp. v. Data Products Corp.*, 135 N.W.2d 681, 687 (Minn. 1965); *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 601 (Minn. 1957); *Grimes v. Toensing*, 277 N.W. 236, 238 (Minn. 1938)).

Rule 7 of the WorldPerks Program states unambiguously that abuse of WorldPerks, including "improper conduct as determined by Northwest *in its sole judgment*," is grounds for "cancellation of the member's account and future disqualification from program participation . . ." (Compl. Ex. C (emphasis added).) Plaintiff's allegations that he was not provided adequate explanation for Northwest's revocation of his "Platinum Elite" status and that "improper conduct" is not well defined in the agreement are not pertinent here, since Northwest was not required by the agreement to explain its decisions or define what it considers "improper conduct." (*Id.* ¶¶ 29-30.) To hold that Northwest was required to explain itself to Plaintiff's satisfaction would be an "enlargement or enhancement" of the parties' agreement beyond its express terms, which *Wolens* does not allow. 513 U.S. at 233.

More importantly, Plaintiff's bare assertion that Defendants revoked Plaintiff's "Platinum Elite" status "without valid cause" is not supported by the contract itself. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998) (when considering a motion to dismiss, the Court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint"). For the very issue of what qualifies

as "valid cause" allowing revocation of Plaintiff's "Platinum Elite" status was left to the "sole judgment" of Northwest. Plaintiff in effect asks that the Court replace Northwest's judgment with his own regarding what counts as "abuse" of WorldPerks. This, however, would transgress the unambiguous terms of the agreement by inserting into it external norms supplied by the Plaintiff, the Court, or both. *See, United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d, at 609-10. Minnesota contract law and the preemption clause of the ADA do not allow the agreement to be altered in this way; consequently the breach of contract claim cannot stand.

That being said, this Court must grant leave to amend unless it "determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *DeSoto*, 957 F.2d at 658. Given that it does not appear certain that Plaintiff could not cure the deficiencies described in this order, the Court dismisses this cause of action without prejudice.

CONCLUSION

For the reasons stated, Defendant's motion to dismiss is GRANTED and the hearing set for July 23, 2009 is VACATED. Plaintiff's claims for [1] breach of good faith and fair dealing, [2] negligent misrepresentation, and [3] intentional misrepresentation are DISMISSED WITH PREJUDICE. His claim for breach of contract, however, is DISMISSED WITHOUT PREJUDICE. If Plaintiff elects to amend his complaint, he SHALL FILE the First Amended Complaint within twenty one days of the date order is electronically docketed.

If Plaintiff fails to file within that time the clerk shall close the file.

IT IS SO ORDERED.

DATED: July 8, 2009.

Honorable Janis L. Sammartino
United States District Judge

Appendix E

Relevant Statute

49 U.S.C § 41713

Preemption of authority over prices, routes and service

(a) Definition.— In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.—

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.—

(A) General rule.— Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.— Subparagraph (A)—

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1)—This paragraph shall not limit the applicability of paragraph (1).

OPPOSITION BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
DEC 14 2012
OFFICE OF THE CLERK

No. 12-462

IN THE
Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., and DELTA AIR LINES, INC., a Delaware corporation,
Petitioners,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,
Respondent.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Ninth Circuit

Respondent's Brief in Opposition

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December 2012

QUESTION PRESENTED

Rabbi S. Binyomin Ginsberg is a long-standing and frequent Northwest passenger who, in 2005, earned the highest level of membership benefits in Northwest's "WorldPerks" customer loyalty program. In 2008, Northwest abruptly revoked his status in the program. Rabbi Ginsberg filed suit alleging, as relevant here, that Northwest breached the implied covenant of good faith and fair dealing in terminating his WorldPerks membership status. The question presented is:

Did the court of appeals correctly hold that Rabbi Ginsberg's contract claim based on the implied covenant of good faith and fair dealing is not preempted by the Airline Deregulation Act's preemption provision, 49 U.S.C. § 41713(b), which provides that States "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier"?

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INTRODUCTION

In *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995), this Court held that although the Airline Deregulation Act's (ADA) preemption provision "bars state-imposed regulation of air carriers," it "allows room for court enforcement of contract terms set by the parties themselves." Such state-law-based contract claims, it explained, involve "privately ordered obligations and thus do not amount to a State's enact[ment] or enforce[ment] [of] any law" within the meaning of the preemption provision. *Id.* at 228-29 (internal quotations and citation omitted). Relying heavily on *Wolens*, the court below held that the ADA does not preempt Rabbi S. Binyomin Ginsberg's claim for breach of the implied covenant of good faith and fair dealing based on Northwest's termination of his status in its WorldPerks customer loyalty program. Although Northwest can choose whether to establish such a program, the court explained, "that economic decision means that the airline has to abide by its contractual obligations, within this deregulated context, pursuant to the covenant of good faith and fair dealing." Pet. App. 16-17.

Northwest and its parent corporation, Delta Air Lines, seek review, contending the lower court's decision is "in conflict with the decisions of other Circuits." Pet. i. But there is no circuit split over whether the ADA preempts contract claims based on the doctrine of good faith and fair dealing. And although petitioners claim the decision below is the culmination of a "trifecta" of cases that have been "the source of significant Circuit conflict," Pet. 12, the other two cases in the purported trifecta involved only the "related to" language in the ADA's preemption provision, not the "enact or enforce a law" language at issue in *Wolens*. Moreover, even looking only at the "related to"

language, Rabbi Ginsberg's claim does not implicate the disagreements some courts have had with the two other cases on which petitioners focus.

The court of appeals correctly held that the ADA does not preempt Rabbi Ginsberg's contract claim based on the implied covenant of good faith and fair dealing. The covenant of good faith and fair dealing is an implied term of the parties' contract. Claims based on the covenant are contract claims, and determining whether the covenant was breached involves contract interpretation and the parties' justified expectations in entering the agreement. Like the contract claims in *Wolens*, good faith and fair dealing claims involve "privately ordered obligations and thus do not amount to a State's enact[ment] or enforce[ment] [of] any law" within the meaning of the preemption provision. *Wolens*, 513 U.S. at 228-29 (internal quotations and citation omitted). Moreover, Rabbi Ginsberg's good faith and fair dealing claim over whether his membership status in a customer loyalty program could be terminated without valid cause is far removed from Congress's deregulatory concerns in enacting the ADA. The petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

Rabbi Ginsberg is an expert in education and administration who travels extensively throughout the United States and abroad to give lectures, conduct seminars and workshops, and advise other educators and administrators. Dist. Ct. Doc. No. 1, at ¶ 12. Rabbi Ginsberg and his wife travel almost exclusively on Northwest, logging approximately 75 flights with the airline each year. *Id.* ¶ 13.

Since 1999, Rabbi Ginsberg has been a member of Northwest's customer loyalty program, known as WorldPerks. In 2005, because of his extensive travel, he achieved Platinum Elite status in the program. *Id.* ¶ 12.

In June 2008, however, Rabbi Ginsberg received a call from a Northwest representative telling him that Northwest was revoking his Platinum Elite status, purportedly because he had abused the program by complaining to the Customer Care line too many times, allegedly booking reservations on full flights with the purpose of being bumped, and being bumped from flights too often. *Id.* ¶ 15. In fact, Rabbi Ginsberg contacted customer service in only a small percentage of the flights he and his wife took and had no control over the booking policies that led Northwest to "bump" him. *Id.* ¶¶ 33-34.

Rabbi Ginsberg, who was in the car en route from Detroit to Chicago when he received the call, asked for the representative's number so he could call her back when he had access to his program records. He was told that there was nothing more to discuss, and that he would be receiving a letter from Northwest's Customer Care department officially revoking his status and explaining in detail what he had done to warrant the revocation. *Id.* ¶¶ 15-16. At the time of the call, Rabbi Ginsberg's Platinum Elite card showed an expiration date of February 2009. *Id.* ¶ 15.

Rabbi Ginsberg subsequently contacted Northwest's Legal Department and spoke with a representative who told him that Northwest has the right to terminate his program membership at any time. She added that Northwest also was revoking his wife's Silver Elite WorldPerks status and that Northwest was sending a letter explaining its actions. *Id.* ¶ 17.

Rabbi Ginsberg later received a letter dated July 18, 2008 from Northwest's Customer Care Coordinator. That letter, however, did not mention revoking his WorldPerks status, nor did it assert that Rabbi Ginsberg had ever abused the program. Instead, it noted that Rabbi Ginsberg had repeatedly contacted the customer care office regarding travel problems, apologized for the many problems Rabbi Ginsberg had encountered with Northwest's services, thanked him for bringing the problems to Northwest's attention, but stated that it would no longer be providing him compensation every time he contacted the airline. *Id.* Exh. A.

Over the following months, Rabbi Ginsberg, who was maintaining his heavy flight schedule on Northwest, continued to try to ascertain his status with the WorldPerks program, but received inconsistent responses. *Id.* ¶¶ 25-27. Finally, on November 20, 2008, in response to an email from Rabbi Ginsberg to the Customer Care Coordinator in which Rabbi Ginsberg sought "clarification as to my Platinum status" and asked if she would "be so kind and inform me of why my status has been removed," the Customer Care Coordinator sent Rabbi Ginsberg an email pointing him towards paragraph 7 of the WorldPerks Terms and Conditions. *Id.* Exh. B. That paragraph states:

> Abuse of the WorldPerks program (including failure to follow program policies and procedures, the sale or barter of awards or tickets and any misrepresentation of fact relating thereto or other improper conduct as determined by Northwest in its sole judgment, including, among other things, violation of the tariffs of Northwest or any partner airline participant in the program, any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor

> Northwest employees' instructions) may result in cancellation of the member's account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards. Any violation of these rules may result in confiscation of tickets at any time (including en route) and the payment by the WorldPerks member or passenger of the full applicable Y, C, J, F or P fare for any segment traveled on program award tickets that have been misused. In connection with the enforcement of any of the terms and conditions governing the WorldPerks program, Northwest Airlines reserves the right to take appropriate legal actions, as it deems necessary, and to recover damages, attorneys' fees, and court costs.

Id. Exh. C. The email did not state in what way Northwest believed Rabbi Ginsberg had abused the WorldPerks program.[1] As a result of the termination of

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[1]The petition states that Rabbi Ginsberg "speculates that he was dismissed for 'untoward or harassing behavior with reference to [a] Northwest employee,'" Pet. 5, which could be interpreted to mean that he agreed that he had engaged in such behavior. He did not. Rather, in the paragraph of the complaint cited in the petition, Rabbi Ginsberg noted that "Given that plaintiff has neither engaged in, nor been accused of, 'failure to follow program policies and procedures' or 'the sale or barter of awards or tickets and any misrepresentation of fact relating thereto,' plaintiff can only conclude that Northwest was asserting that he had engaged in 'other improper conduct as determined by Northwest in its sole judgment, including, among other things . . . untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees' instructions . . . ." Dist. Ct. Doc. No. 1, at ¶ 29 (emphasis removed).

his status, Rabbi Ginsberg lost valuable rights under the program. *Id.* ¶ 40.

B. Proceedings Below

On January 8, 2009, Rabbi Ginsberg filed this case against Northwest and Delta on behalf of himself and all other program members whose program status was revoked without valid cause, alleging breach of written contract, breach of the duty of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation. *Id.* ¶¶ 41-45. The district court granted defendants' motion to dismiss, Pet. App. 61, holding that Rabbi Ginsberg failed to allege sufficient facts to show a material breach of contract and that his other claims are preempted by the ADA, which provides that States "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b).

Rabbi Ginsberg appealed solely with respect to his claim for breach of the implied covenant of good faith and fair dealing. The court of appeals reversed, holding that "the ADA does not preempt this common law contract claim." Pet App. 3.[2]

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[2]The panel originally consisted of Judges Beezer, Rymer, and Trott. Pet. App. 20. After the decision was filed, but while the case was pending on a petition for rehearing or rehearing en banc, Judge Rymer passed away. Judge Schroeder replaced her on the panel, and the court withdrew the original opinion and filed a new opinion that was authored and approved by Judge Beezer before he passed away. *Id.* at 2. Because the earlier decision has been superseded, this brief focuses on the amended opinion.

The court of appeals began with a general discussion of preemption principles, but the majority of its analysis is in a section of its decision entitled "Supreme Court and Ninth Circuit Precedent." *Id.* at 8-17. After discussing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), this Court's first decision interpreting the ADA's preemption provision, the court of appeals focused on *Wolens*, 513 U.S. 219, which considered whether the ADA preempts state consumer fraud act and breach of contract claims based on the devaluation of credits earned in a frequent flyer program. As the court of appeals explained, *Wolens* held that the ADA preempted the state consumer fraud act claims, but "allowed the breach of contract claim to go forward, making clear that the ADA 'allows room for court enforcement of contract terms set by the parties themselves.'" Pet. App. 10 (quoting *Wolens*, 219 U.S. at 222). "In so doing," the court of appeals noted, "the Court held that Congress did not intend to preempt common law contract claims." *Id.* (quoting *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1264 (9th Cir. 1998) (en banc)).

The court of appeals noted that *Wolens* drew a "clear distinction . . . between state laws that regulate airlines and state enforcement of contract disputes." *Id.* Because it viewed this distinction as "crucial," *id.*, the court of appeals quoted "at length" *Wolens*'s explanation of the distinction. *Id.* at 10-12. It then explained that, "[i]n sum, the Court concluded that a state does not 'enact or enforce any law' when it uses its contract laws to enforce private agreements." *Id.* at 12.

After briefly discussing *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), the Court's most recent ADA-related preemption case, the court of appeals ran through numerous additional factors in

support of the conclusion that the ADA does not preempt common law contract claims such as Rabbi Ginsberg's. The court noted that it had concluded in *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), that a claim for breach of the covenant of good faith and fair dealing was too tenuously connected to airline deregulation to trigger ADA preemption. Pet. App. 14. It pointed out that the purpose of the preemption clause was to "prevent state interference with the mandate of deregulation." *Id.* It determined that the ADA's savings clause evidenced congressional intent to preserve "state contract remedies that already existed at common law, such as the implied covenant of good faith and fair dealing." *Id.* at 15. And it explained, as this Court did in *Wolens*, that the Department of Transportation "is not equipped to handle contract disputes," contrasting the lack of regulation of contract disputes with the many agency regulations on airline safety. *Id.*

The court concluded the section by explaining that "Northwest is free to invest in a frequent flier program," but "that economic decision means that the airline has to abide by its contractual obligations, within this deregulated context, pursuant to the covenant of good faith and fair dealing." *Id.* at 16-17. "[S]tate enforcement of the covenant is not 'to force the Airlines to adopt or change their prices, routes or services—the prerequisite for ADA preemption.'" *Id.* at 17 (citation omitted).

In a separate section, the court explained that it disagreed with the district court's conclusion that Rabbi Ginsberg's claim for breach of the covenant of good faith and fair dealing would "relate to" prices and services. *Id.*

Northwest petitioned for rehearing and rehearing en banc. While the motion was pending, Judge Rymer passed

away, and an amended opinion was issued. *See supra* n. 2. The court denied the petition. Pet. App. 2.

REASONS FOR DENYING THE WRIT

I. Resolution of the Question Whether Claims of Good Faith and Fair Dealing Are Unrelated to Prices, Routes, and Services Would Not Affect the Outcome Here.

For a claim to be preempted under the ADA, it must (1) involve the "enact[ment] or enforce[ment] [of] a law, regulation, or other provision having the force and effect of law," that (2) is "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b). In *Wolens*, 512 U.S. at 228-29, this Court held that the ADA does not preempt claims based on contract terms because they do not involve the "enact[ment] or enforce[ment]" of a law within the first prong of the test.

In their question presented, petitioners depict the decision below as relying solely on the second, "related to" prong and seek certiorari to resolve the question whether the court of appeals erred "by holding . . . that respondent's implied covenant of good faith and fair dealing claim was not preempted under the ADA because such claims are categorically unrelated to a price, route, or service." Pet. i-ii. But the decision below was not based solely on the preemption provision's "related to" language. By the time it noted that it disagreed with the district court on whether Rabbi Ginsberg's claim was related to prices, routes, or services, Pet. App. 17, the court of appeals had already concluded, relying heavily on *Wolens*, that the ADA did not free Northwest from "abid[ing] by its contractual obligations . . . pursuant to the covenant of good faith and fair dealing." *Id.* at 16-17; *see also, e.g., id.* at 12 (noting that institutional limitations "demonstrate the

ADA cannot preempt breach of contract claims, including those based on common law principles such as good faith and fair dealing"); *id.* at 14 (finding it "evident" that Congress "did not intend [the ADA] to preempt state common law contract claims"). Indeed, the petition itself recognizes that the court below determined that implied covenant of good faith and fair dealing claims are among the "contract claims saved from preemption in *Wolens*," Pet. 17, which relied on the preemption provision's "enact or enforce a law" language, not its "related to" language.

Because, like the contract claims in *Wolens*, claims based on the implied covenant of good faith and fair dealing do not involve the "enact[ment] or enforce[ment] [of] a law, regulation, or other provision having the force and effect of law," 49 U.S.C. § 41713(b), resolution of the question whether good faith claims in general, or Rabbi Ginsberg's claim in particular, are unrelated to prices, routes, and services would not alter the conclusion that Rabbi Ginsberg's claim is not preempted.

II. There Is No Relevant Circuit Split.

A. The Circuits Are Not Split Over Whether the ADA Preempts Contract Claims Based on the Doctrine of Good Faith and Fair Dealing.

The petition is replete with references to circuit splits, asserting even in the question presented that the holding below is "in conflict with the decisions of other Circuits." Pet. i. In particular, Petitioners argue that the decision below conflicts with decisions of other circuits by declaring good faith and fair dealing claims "categorically exempt from preemption," whereas other circuits have recognized that "*Wolens* . . . requires an individualized inquiry into the nature of the implied covenant of good faith claim." Pet. 17. But contrary to petitioners' assertions, the decision below

does not hold that whether a claim is preempted depends simply on whether the plaintiff "label[ed]" it a claim for breach of the covenant of good faith and fair dealing. Pet. 13, 14, 33. Rather, it held that claims that actually *are* contract claims based on the doctrine of good faith and fair dealing are not, because of their nature, preempted. Petitioners cite no cases that conflict with that holding.

First, although the petition claims that the lower court's holding that the ADA does not preempt good faith and fair dealing claims is contrary to the holdings of other "courts to address this issue, including the First and Seventh Circuits," Pet. 14, the Seventh Circuit case on which petitioners rely, *Travel All Over the World, Inc. v. Kingdom of Saudia Arabia*, 73 F.3d 1423 (7th Cir. 1996), does not involve a good faith and fair dealing claim, let alone "address" whether such claims are preempted by the ADA. In that case, a travel agency sued an airline for cancelling the agency's clients' tickets, thereby forcing the clients to repurchase the tickets directly through the airline, and for making false statements about the agency to its clients, such as that the agency had not booked seats for many of them. The complaint alleged breach of contract, defamation, slander, fraud, intentional infliction of emotional distress, and tortious interference with a business relationship. *Id.* at 1428. The Seventh Circuit held that the breach of contract claims were not preempted under *Wolens* and that the defamation and slander claims were not related to prices, routes, or services, but that the other tort claims were preempted. *Id.* at 1432-35.

Although *Travel All Over the World* does not involve a good faith and fair dealing claim, the petition suggests it conflicts with the decision below because, in a footnote, the Seventh Circuit noted that it did not "foreclose the possibility that, upon remand and further development of

the case, the district court may find that the plaintiffs are relying on principles of contract law that do not 'seek to effectuate . . . the intent of the parties,' which could be open to preemption under *Wolens*." *Id.* at 1432 n.8. According to the petition, through this footnote, the Seventh Circuit recognized that *Wolens* "cannot possibly support the categorical exemption adopted by the Ninth Circuit." Pet. 17. But the Seventh Circuit's recognition that claims based on *some* contract-law principles may "be open to preemption under *Wolens*" does not conflict with the lower court's holding that claims based on good faith and fair dealing principles are not preempted. Rather, the Seventh Circuit's recognition that claims that do seek to effectuate the parties' intent are not preempted is consistent with the holding below that good faith and fair dealing claims, which look to the parties reasonable expectations in entering the agreement, are not preempted.[3]

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[3]The petition also suggests a circuit split between the decision below and *Travel All Over the World* on the "related to" prong of the preemption test, quoting a district court that stated that the decision below "was decided in large part . . . on the conclusion that the implied covenant of good faith and fair dealing can never 'relate to' prices, routes, or services," and that such a conclusion appeared to be in conflict with a statement in *Travel All Over the World* that the court must look at the facts alleged to determine whether a claim relates to prices, routes, or services. Pet. 29 (quoting *Newman v. Spirit Airlines, Inc.*, No. 12-2897, 2012 WL 3134422, *3-4 (N.D. Ill. July 27, 2012)). But although the section of the decision below that focuses on the "related to" language is titled "the implied covenant of good faith and fair dealing does not 'relate to' prices, routes, or services," Pet. App. 17, that section simply states that the court disagreed with the district court about whether *Rabbi Ginsberg's* claim was sufficiently related to prices, routes, or services to be preempted. *Id.* Given the differences in the facts and claims alleged here and the facts

(continued...)

Likewise, Petitioners suggest a conflict with *Data Manufacturing, Inc. v. United Parcel Service, Inc.*, 557 F.3d 849 (8th Cir. 2009). However, like *Travel All Over the World*, that case did not involve a good faith and fair dealing claim and thus does not speak to whether contract claims based on the doctrine of good faith and fair dealing are preempted.

In contrast to *Travel All Over the World* and *Data Manufacturing*, the First Circuit decision on which the petition relies, *Buck v. American Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007), at least involves a good faith and fair dealing claim. Nonetheless, it, too, does not conflict with the decision below. In *Buck*, customers who had bought non-refundable tickets that they did not use sued several airlines for failing to refund various taxes and fees that did not become due until the travel took place. The plaintiffs alleged "multitudinous statements of claim," *id.* at 32, one of which was for breach of a covenant of good faith and fair dealing, but the crux of their argument was that they were seeking to enforce federal policy. The court first rejected the arguments that there was an implied right of action under ADA regulations, that plaintiffs' state-law claims were outside the ambit of preemption because they were using state remedies to enforce federal policy, and that plaintiffs' claims were unrelated to prices. *Id.* at 34-36. The court then addressed the argument that the contract-based claims were free from preemption under *Wolens*. The court held that claims based on allegations of implicit

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[3](...continued)
and claims alleged in *Travel All Over the World*, there is no conflict between the conclusions that Rabbi Ginsberg's claim is not preempted but that some of the claims alleged in *Travel All Over the World* are preempted.

contract terms failed, including the claim labeled good faith and fair dealing, because the terms the plaintiffs argued were part of the contract were provisions from a federal regulation, and the federal regulation could not "be read as an implied contract provision" because doing so would be an "evasion of the implied right of action doctrine." *Id.* at 37.

Thus, *Buck* does not hold that contract claims based on the doctrine of good faith and fair dealing are preempted; it holds that plaintiffs cannot evade the implied right of action doctrine by trying to enforce federal regulations under the guise of a contract law claim, and thus that the plaintiffs had failed to establish such a claim. That issue is not relevant here, and *Buck* presents no conflict with the decision below.

B. This Court Should Not Grant the Petition to Resolve Circuit Splits Not Implicated by this Case or to Review the Ninth Circuit's Jurisprudence Generally.

Unable to show a circuit split on the question of whether the ADA preempts contract claims based on the implied covenant of good faith and fair dealing, petitioners assert that the Court should grant certiorari because "the Ninth Circuit has repeatedly strayed from this Court's teaching about the ADA." Pet. 33. According to the petition, the decision below is part of a "trilogy of seminal ADA preemption cases," Pet. 21; the other two cases in the "trifecta" have engendered conflict; and the decision below "entrench[ed] and perpetuat[ed] the already existing conflict." Pet. 12-13. But the grounds on which courts have disagreed with the other two cases are not implicated by this petition, and this Court should not grant the

petition generally to review "the Ninth Circuit's jurisprudence." Pet. App. 22.

First, petitioners focus on *West v. Northwest Airlines, Inc.*, 995 F.2d 148, devoting almost four pages of their petition to the case. In *West*, the Ninth Circuit, relying on *Morales*, held that a claim for compensatory damages for breach of the covenant of good faith and fair dealing, based on the airline's having bumped the plaintiff from a flight for which he had a ticket, did not meet the "related to" prong of the preemption test. The court based its decision largely on federal regulations that explicitly allow passengers who are bumped to seek relief in court. *See* 14 C.F.R. 250.9(b). As the petition notes, in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340 (5th Cir. 1995), the Fifth Circuit disagreed with *West*, stating that it considered "a lawsuit for overbooking . . . [to] 'relate to' the airline's contract for 'services' with its passenger." But whether a claim for breach of the covenant of good faith and fair dealing based on overbooking is sufficiently related to prices, routes, or services to be preempted given federal regulations on overbooking is irrelevant here. This case does not involve an overbooking claim, and Rabbi Ginsberg's claim, based on the termination of his status in a customer loyalty program, is far more tenuously related to airline prices, routes, or services than an overbooking claim. Moreover, contrary to petitioners' claim, there is no indication that the decision below read *West* to "*requir[e]* the conclusion" that Rabbi Ginsberg's claim was not related to prices, routes, or services. Pet. 28 (emphasis added).

Petitioners also devote significant attention to *Charas v. Trans World Airlines, Inc.*, 160 F.3d at 1266, which which held that "Congress used 'service' in [the ADA] in the public utility sense—i.e., the provision of air

transportation to and from various markets at various times." Petitioners note that other circuits have adopted broader definitions of "services." Pet. 26-27. But petitioners do not show that differences in the circuits' definitions of "services" would make a difference in *this* case. And the decision below does not rely on *Charas*'s definition of "services."

Thus, this case does not implicate the disagreements some courts have had with various aspects of *West* and *Charas*. Moreover, *West* and *Charas* involved only the "related to" prong of the preemption test. As the petition notes, however, the court of appeals below concluded that breach of covenant of good faith and fair dealing claims were among the "breach of contract claims saved from preemption in *Wolens*," Pet. 17, which involves the "enact or enforce a law" prong of the preemption provision. Because the claims here do not involve the "enact[ment] or enforce[ment] [of] a law" within the meaning of the ADA's preemption clause, resolution of any disagreements about only the "related to" language in the preemption provision would not alter the outcome of this case.

III. The Decision Below Is Consistent With This Court's Case Law and Correct.

The court of appeals correctly held that the ADA does not preempt Rabbi Ginsberg's claim for breach of the covenant of good faith and fair dealing.

First, Rabbi Ginsberg's claim does not involve the "enact[ment] or enforce[ment]" of a law within the meaning of the ADA. In *Wolens*, the Court considered whether the ADA preempted consumer fraud act and contract claims based on retroactive modifications in a frequent flyer program that devalued frequent flyer credits already accumulated. The Court determined that

the contract claims were not preempted because they did not involve the enactment or enforcement of a law. "[T]he ADA's preemption prescription," it held, "bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves." 513 U.S. at 222.

The Court recognized that the term "enforce" could be read to include state-court enforcement of private agreements. *Id.* at 229 n.5. However, it did "not read the ADA's preemption clause . . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's breach of its own, self-imposed undertakings." *Id.* at 228. It noted that the ADA was "designed to promote 'maximum reliance on competitive market forces,'" and explained that "[m]arket efficiency requires effective means to enforce private agreements." *Id.* at 230 (citation omitted). It pointed out that the Department of Transportation has no administrative process for adjudication of private contract disputes. And it found it not "plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to rates, routes, or services." *Id.* at 232. Finally, it concluded that allowing adjudication of contract claims made sense of the Federal Aviation Act's (FAA) savings clause. Overall, it explained that the "ADA's preemption clause, . . . read together with the FAA's savings clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored the term the airline itself stipulated." *Id.* at 232-33.

Like the contract claims at issue in *Wolens*, Rabbi Ginsberg's covenant of good fath and fair dealing claim

involves a contract into which the airline entered voluntarily, not state-imposed "substantive standards with respect to rates, routes, or services." *Id.* at 232. Just as the airline, in agreeing to the contract, was agreeing to its explicit terms, it was also agreeing to perform those terms with good faith. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205. "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.* comment a. Determining whether the covenant of good faith and fair dealing has been breached does not involve application of external state policies on prices, routes, and services; it involves contract construction and evaluation of the legitimate expectations of the parties. Here, Rabbi Ginsberg's claim seeks to have the airline perform the WorldPerks contract in a manner consistent with his reasonable expectations. Dist. Ct. Doc. No. 1, at ¶¶ 56-57. This claim relates to "privately ordered obligations 'and thus do[es] not amount to a State's 'enact[ment] or enforce[ment] [of] any law'" within the meaning of the ADA's preemption provision. *Wolens*, 513 U.S. at 228-29 (citation omitted).

Moreover, although the Ninth Circuit's decision was not based on this ground, Rabbi Ginsberg's claim also is not preempted because it arises under the common law and does not involve a "law, regulation, or other provision having the force and effect of law." *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (interpreting "a law or regulation" in an express preemption provision to encompass only positive enactments).

Finally, Rabbi Ginsberg's claim does not involve enactment or enforcement of a law "related to a price,

route, or service of an air carrier." 49 U.S.C. § 41713(b). Petitioners assert that Rabbi Ginsberg's claim must relate to prices, routes, and services because this Court determined that the claims at issue in *Wolens* related to prices and services, and, like those claims, Rabbi Ginsberg's involves a frequent flyer program. Pet. 20. But Rabbi Ginsberg's claim here is far more tenuously related to prices, routes, and services than those at issue in *Wolens*. *Wolens* involved specific frequent flyer program modifications that reduced the value of mileage credits earned when they were exchanged for tickets or upgrades, such as new limits on seats available to passengers obtaining tickets with mileage credits and restrictions on when credits could be used. The Court determined that the claims challenging these modifications "relate to 'rates,' *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates." *Wolens*, 513 U.S. at 226. Rabbi Ginsberg's claim, in contrast, does not relate to the value of WorldPerks credits in general in obtaining tickets or upgrades, but to whether Northwest could terminate his membership status in a customer loyalty program without valid cause.

In enacting the ADA, Congress sought to promote "maximum reliance on competitive market forces." *Morales*, 504 U.S. at 378 (citation omitted). The purpose of the preemption provision was to "ensure that the States would not undo federal deregulation with regulation of their own." *Id.* Rabbi Ginsberg's claim is not based on any state regulation of air carriers, but on the covenant of good faith found in every contract. Requiring air carriers to perform contractual obligations into which they voluntarily

enter in good faith is far removed from Congress's deregulatory goals, and the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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December 2012

REPLY BRIEF

No. 12-462

In the Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., and DELTA AIR LINES, INC., a Delaware corporation,

PETITIONERS,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent's defense of the Ninth Circuit decision is simple and well illustrates the square conflict between the decision below and precedents of this Court and the other Circuits. Respondent contends that his implied covenant of good faith and fair dealing claim is categorically immune from ADA preemption because it is a "contract claim" and thus does not "enforce" state law. Never mind that respondent's breach of contract claim was rejected; and never mind that his *implied* covenant of good faith claim is a creature of state law, and never mind that his claim expressly attempts to override the parties' voluntary undertakings which allocated the dispute to petitioners' "sole judgment." Never mind all that, respondent suggests that because his claim is a "contract claim," it does not involve an effort to "enforce" state law and is not preempted.

There are two principal problems with respondent's position. First, it misdescribes what the Ninth Circuit actually held. Building on its prior erroneous circuit precedent, the Ninth Circuit found contract claims, including implied covenant of good faith claims, to categorically escape preemption on the misguided theory that such claims never "relate to" airline deregulation, *not* on the equally misguided theory that they never "enforce" state law. Second, and even more fundamentally, respondent's effort to recharacterize the Ninth Circuit's decision does nothing to eliminate the square conflict with this Court's decisions and with other Circuits that follow this Court's direction. In *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), this Court made clear that what allowed an ordinary breach of contract claim to escape preemption was that the courts would

enforce only the parties' voluntary undertakings, not state laws that enlarged the parties' bargain. This case amply illustrates the difference: respondent's unsuccessful garden-variety breach-of-contract claim attempted to enforce the parties' voluntary undertaking; respondent's implied covenant claim, which the Ninth Circuit allowed to proceed, attempts to enlarge the bargain by creating a state-law limitation on the contractual "sole judgment" language. The fact that the latter claim may be labeled a contract claim, rather than a tort or statutory claim, makes no difference as this Court expressly noted in *Wolens*. Other Circuits understand this distinction and have rejected simplistic efforts to use state "contract law" to enlarge the parties' bargain well beyond the parties' voluntary undertakings.

The conflict is stark. Indeed, the decision below is not some outlier, but the culmination of a trilogy of Ninth Circuit decisions that are fundamentally inconsistent with this Court's own trilogy of ADA and FAAAA preemption cases. It will take a fourth Supreme Court case to bring the Ninth Circuit into line, and this case presents the ideal vehicle. The difference between voluntary undertakings and the use of state law to enlarge the parties' bargain is perfectly illustrated by the unsuccessful breach-of-contract claim on the one hand and the implied covenant claim on the other. Moreover, the problem with the Ninth Circuit's "relates to" jurisprudence—the actual ground for its decision—is perfectly illustrated by its conclusion that the claims here do not "relate to" prices, routes, or services, even though they involve a frequent flyer program, the precise context of *Wolens*. The need for this Court's review is

acute, and it will not find a better vehicle for that necessary review.

I. Neither The Ninth Circuit's Decision Nor Respondent's Recharacterization Of It Can Be Reconciled With The Precedent Of This Court And Other Circuits

Respondent's primary strategy for avoiding this Court's review is to portray the Ninth Circuit's decision as holding that respondent's implied covenant claim escapes preemption because it does not involve the "enforcement" of state law, not because it does not "relate to" prices, routes and services. This re-characterization of the Ninth Circuit's holding ultimately does nothing to ameliorate the starkness or seriousness of the splits in authority, but it also fundamentally misdescribes the decision below. In reality, the Ninth Circuit unequivocally declared *all* implied covenant of good faith claims *by definition* outside the scope of ADA preemption, App. 19 ("We conclude that a claim for breach of the implied covenant of good faith and fair dealing is not preempted by the ADA."), based on the extraordinary proposition that all "common law contract claims" are categorically unrelated to rates, routes, and services—apparently including not just implied covenant claims, but claims for unjust enrichment, promissory estoppel, quantum merit, and whatever else state law might label a contract claim, App. 5 ("[T]he ADA does not preempt state-based common law contract claims, such as the implied covenant of good faith and fair dealing."). Indeed, district courts, with no incentive to spin the decision in one direction or the other, are already citing *Ginsberg* as controlling precedent for

precisely that holding. *See, e.g., Alim v. Aircraft Service Intern., Inc.*, 2012 WL 3647403, at *2 (N.D. Cal. Aug. 23, 2012) (citing the decision below for the proposition that "while the words 'related to' express the ADA's broad preemptive purpose with regards to proscriptive state statutes, the ADA's preemption provision is not broad enough to displace state common law contract claims.").

A. The Ninth Circuit's Decision And Respondent's Recharacterization Of The Decision Both Squarely Conflict With This Court's Precedent

As explained in the Petition, this Court's decisions in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), *Wolens*, and *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), collectively interpret the ADA and FAAAA as reflecting Congress's intent to broadly protect the airline and transportation industries from state efforts at reregulation whether via statutory or common-law claims. Pet. 1-4. The Ninth Circuit's conclusion that *all* common law contract claims escape preemption because they are insufficiently related to airline deregulation is a complete outlier. Indeed, it is telling that respondent's brief begins not by defending the decision below, but by recharacterizing it as "relying heavily on *Wolens*" and the logic that contract claims do not "enforce" state laws such that reversal of the "related to" holding "would not alter the conclusion that [respondent's] claim is not preempted." Opp. 9-10.

But the Ninth Circuit did not, as respondent implies, apply *Wolens* to hold that implied covenant of

good faith claims do not involve the enforcement of state law. Such a decision would be equally misguided, but that is simply not the decision the Ninth Circuit wrote. Instead, the decision cites *Wolens* only for the mistaken proposition that *Wolens* somehow supports the Ninth Circuit's previous holdings in *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), and *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998), that entire categories of common law contract and tort claims are wholly exempt from ADA preemption because they are by definition "too tenuously connected" to airline deregulation. App. 9-16; *see also* App. 40 (Judge Rymer observing that the panel did *not* undertake "the *Wolens* inquiry of whether Ginsberg's claim alleges a violation of a state-imposed obligation or a self-imposed undertaking"). This baffling invocation of *Wolens* does not mitigate the error of the Ninth Circuit's decision, but compounds it by foreclosing any future possibility of the Ninth Circuit correcting its own errors. Not only is *Charas* an en banc decision, but the Ninth Circuit views its doctrine as consistent with *Wolens*.

Moreover, respondent's effort to recharacterize the Ninth Circuit's decision does nothing to eliminate the square conflict with this Court's decisions and those of the other courts of appeals. Of course, any notion that respondent's frequent flyer program claims do not "relate to" prices, routes and services is foreclosed by *Wolens*, which involved frequent flyer program claims. But *Wolens* is equally clear that merely labeling a claim a "contract claim" does not allow it to escape preemption if it, in fact, seeks to enlarge the parties' bargain beyond their voluntary

undertakings. What made garden-variety breach-of-contract claims un-preempted was not that they fell within the rubric of state contract law, but that they involved only the enforcement of the parties' voluntary undertakings, not the enforcement of state law that would enlarge the bargain. Respondent's *implied* covenant claim is, as its name suggests, a paradigmatic effort to expand the airline's obligations beyond its explicit contractual undertakings. Indeed, it is indisputable that respondent invokes state law in an effort to alter those voluntary undertakings, which expressly give Northwest sole discretion to determine whether a member's behavior constitutes abuse warranting dismissal from the program. Pet. 12-19.

Respondent argues the decision below can be defended under *Wolens* because implied covenant of good faith claims "do not involve application of external [] policies" but instead look to the "legitimate expectations of the parties." Opp. 17-18. But respondent's own complaint acknowledges that this supposed duty is "implied" because it is not found in the terms of the agreement but is instead imposed by state law. *See* Dist. Ct. Doc. No. 17, at 12 ("In Minnesota, every contract is subject to an implied covenant known as a covenant of good faith and fair dealing."). If respondent could prevail based on the actual terms of the parties' contractual undertakings, his garden-variety breach of contract claim would have succeeded, not failed. By invoking the Minnesota state-law doctrine of implied covenants to alter the terms of the parties' actual bargain (which assigns the matter to Northwest's "sole judgment"), respondent has made clear beyond all doubt that he seeks to enforce that state law, and not merely the

parties' voluntary undertakings. The fact that state law treats the basis for expanding the bargain as a species of contract law—and not tort or statutory law—matters not in the least.

Indeed, in implicit recognition that common-law contract doctrines that expand the bargain are logically indistinguishable from common-law tort doctrines with the same impermissible effect, respondent takes the extreme position that not just implied covenant claims, but all common-law claims escape preemption because they do not involve a "law, regulation, or other provision having the force and effect of law." Opp. 18. Although respondent suggests that "the Ninth Circuit's decision was not based on this ground," *id.*, the notion that all common law claims are exempt from the ADA appears to be exactly what *West*, *Charas*, and *Ginsberg* collectively hold. Pet. 21-32. That holding is both enormously significant and profoundly wrong. As the district court explained, *Wolens* makes no distinction between state common law and state statutes, but instead distinguishes "between terms an airline itself stipulates on the one hand, and *any* 'enlargement or enhancement based on state laws or policies external to the agreement.'" App. 45 (quoting *Wolens*, 513 U.S. at 233).

Finally, respondent makes a half-hearted attempt to distinguish *Wolens* on the ground that respondent's claim does not relate to prices, routes, or services because it arises out of a dispute over frequent flyer *membership* as opposed to the frequent flyer program *modifications* at issue in *Wolens*. Opp. 18-19. But not even the Ninth Circuit found this distinction material.

See App. 9 (recognizing the similarity in fact pattern to *Wolens*). Rather than focus on such microscopic differences, the Ninth Circuit embraced a categorical exemption of implied covenant claims.

B. The Ninth Circuit's Decision And Respondent's Recharacterization Of It Both Squarely Conflict With The Decisions Of Other Courts of Appeals

The Ninth Circuit's erroneous decision in this case flows directly from its holding that its previous decisions in *West* and *Charas* remain good law and require the conclusion that all implied covenant claims—indeed, all common law contract claims—categorically escape ADA preemption because they do not "relate to" airline deregulation. As the Petition explains, in affirming and relying on *West* and *Charas*, the decision below positioned itself squarely within the already existing circuit conflict arising from the Ninth Circuit's persistent refusal to abide by this Court's ADA jurisprudence. *See* Pet. 21-32.

Respondent does not contest that *West* and *Charas* are the source of significant circuit conflict, or even that those decisions are plainly wrong under this Court's precedent. Instead, respondent argues that *West* and *Charas* are distinguishable from this case. Opp. 14-16. But the Ninth Circuit viewed *West* and *Charas* as *controlling*, not distinguishable. *See* App. 14-17; *see also* App. 39 (Judge Rymer observing that the decision in case is compelled by *West*, even though *West* "seems out of step" with *Wolens*). The problem is not the impossibility of identifying factual distinctions between this case and *West*/*Charas*, but that the Ninth Circuit has embraced a misguided categorical

approach to ADA preemption that renders such factual distinctions irrelevant.

Indeed, the panel's categorical exemption of common law contract claims is a direct product of *West* and *Charas*—or more precisely, a direct product of the Ninth Circuit's failure to recognize that *West* and *Charas* do not survive this Court's decisions in *Wolens* and *Rowe*. The Ninth Circuit's renegade approach to ADA preemption originated in *West*, which held globally that "'the state contract and tort laws under which [the plaintiff sought] relief'" are too tenuously related to routes, rates, and services to trigger preemption, without looking to the specific underlying allegations for the "related to" inquiry. Although *Wolens* subsequently made clear *West*'s analytical errors, the Ninth Circuit refused to adjust course in *Charas*, instead declaring all common law tort claims not "'relate[d] to' prices, routes, or services." *See* Pet. 24-29. And in the decision below, the Ninth Circuit extended *West* and *Charas* to treat all common law contract claims as too tenuously connected to airline deregulation to trigger ADA preemption. App. 14-17.

Respondent has no response to any of this, beyond suggesting correctly that *West* and *Charas* involved the "related to" inquiry, and incorrectly suggesting this case involved the "enforcement" inquiry. Opp. 14-17. In reality, the panel's adherence to and application of *West* and *Charas* explain why the Ninth Circuit, in fact, viewed this as "related to" case, and not an "enforcement" case. But either way, the Ninth Circuit unambiguously treats all contract claims as escaping preemption, and that treatment

unambiguously conflicts with this Court's precedents and the law of other circuits.

Indeed, respondent cannot seriously contest that the precise holding in this case—that common law contract claims including implied covenant claims, are categorically exempt from the ADA—is itself the source of circuit conflict *regardless* whether the rationale relies on the "enforcement" prong or the "related to" prong. As Judge Rymer observed, the Seventh Circuit's decision in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), specifically rejects what the Ninth Circuit did in this case—i.e., developing "broad rules concerning whether certain types of common-law claims are preempted by the ADA." App. 39. It makes no difference that *Travel All Over the World* did not involve an implied covenant claim—the point is that the Seventh Circuit has (correctly) recognized that *Wolens* requires a case-by-case analysis of the underlying allegations to determine whether a contract claim is preempted by the ADA, thus foreclosing the Ninth Circuit's categorical rule. The conflict has been recognized not just by Judge Rymer, but by courts within the Seventh Circuit as well. *See, e.g., Newman v. Spirit Airlines, Inc.*, 2012 WL 3134422, *3-4 (N.D. Ill. July 27, 2012).

Likewise, the Eighth Circuit's decision in *Data Manufacturing, Inc. v. United Parcel Service, Inc.*, 557 F.3d 849 (8th Cir. 2009), squarely forecloses the Ninth Circuit's exemption for implied covenant claims. The Eighth Circuit specifically found preempted the plaintiff's claim that there is an "implicit" state-law prohibition on charging unlawful penalties in all

shipping contracts. *Id.* at 853-54. Although the claim was not labeled an implied covenant claim as such, the Eighth Circuit's reasoning—that an "implicit" contractual obligation by definition requires the enforcement of extra-contractual state law—cannot be squared with the Ninth Circuit's categorical rule.

Moreover, as respondent concedes, the First Circuit's decision in *Buck v. American Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007), specifically dismisses an implied covenant claim as preempted under the ADA, in direct conflict with the Ninth Circuit's categorical rule. The *Buck* plaintiffs challenged an airline's failure to refund various fees and taxes after they were unable to use nonrefundable tickets. Attempting to avoid ADA preemption, the plaintiffs argued that under *Wolens* they could bring contract-based state law claims alleging that the airline's failure to refund the fees violated their contracts of carriage. The First Circuit rejected this argument, explaining that because the plaintiffs could not point to any material breach of the actual contractual terms, they could not rely on *Wolens*. *Id.* at 36. Respondent attempts to distinguish *Buck* on the ground that the *Buck* plaintiffs pointed to federal regulations as the source for the implicit contractual duty to refund the fees and taxes. Opp. 13-14. But the fact that the *Buck* plaintiffs, unlike respondent, had a theory of how recognition of their implied covenant claims would not create a patchwork of conflicting state-law rules, hardly helps respondent. The First Circuit rejected even those quasi-federal implied covenant claims, while the Ninth Circuit applied a categorical rule to allow respondent's implied covenant claims, despite

the very real prospect of conflicting state rules. *See* Pet. 29.

II. The Decision Below Warrants This Court's Review

Respondent does not contest the importance of the issues raised in this case, nor could he. Those involved in the airline and trucking industries recognize the grave threat posed by the decision below. As their amici curiae brief explains, the Ninth Circuit's decision "create[s] a loophole that threatens to swallow the ADA preemption provision," leaving "juries throughout the vast Ninth Circuit . . . free to apply their own form of regulation to airline prices, routes, and services (and, by extension, to those of motor carriers)" and resulting in the exact "patchwork of local regulation that Congress prohibited when it deregulated the airline industry." Amici Curiae Br. 8-9. Moreover, the decision below makes clear that the Ninth Circuit will double and triple down on its blatant refusal to conform its ADA jurisprudence to this Court's precedent. This Court's intervention is sorely needed and this case provides the perfect vehicle for that intervention.

CONCLUSION

The Court should grant the petition for certiorari.

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December 26, 2012

AMICUS CURIAE BRIEF

No. 12-462

In the Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., and DELTA AIR LINES, INC., a Delaware corporation,
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RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE AIRLINES FOR AMERICA AND AMERICAN TRUCKING ASSOCIATIONS, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

Air Transport Association of America, Inc., d.b.a. Airlines for America ("A4A") is the trade organization of the principal U.S. airlines, which together with their affiliates transport more than ninety percent of U.S. airline passenger and cargo traffic.[1] Those members are Alaska Airlines, Inc.; American Airlines, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Hawaiian Airlines, Inc.; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; United Parcel Service Co.; US Airways, Inc.; and Air Canada, which is an associate member.[2]

A4A is a District of Columbia corporation with its principal place of business in the District of Columbia. The A4A does not issue stock, and no publicly held company controls more than 10% of A4A.

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[1] Pursuant to Supreme Court Rule 37, amici state that no counsel for a party authored this brief in whole or in part, and no one other than amici curiae, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Further, amici state that counsel of record for all parties received notice at least ten days prior to the due date of A4A's intention to file this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] A4A also has a number of airline-related industry partners and members, a list of which is available at www.airlines.org/Pages/Members.aspx.

The mission of A4A is to foster a business and regulatory environment that ensures safe and secure air transportation while permitting U.S. airlines to flourish, thus stimulating economic growth locally, nationally, and internationally. As part of that mission, A4A seeks to identify, highlight, and challenge laws and government policies that impose inappropriate regulatory burdens or unfairly impinge on the free operation of the marketplace for the services of its members. Throughout its seventy-five year history, A4A has been actively involved in the development of the law applicable to commercial air transportation by advocating common industry positions on policy and legal issues of importance to its members. A4A has frequently participated as amicus curiae before this Court and other courts. In particular, A4A has participated as a party and as amicus curiae in litigation relating to the preemption provision of the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1708 (1978) (currently codified, as amended, at 49 U.S.C. § 41713(b)(1)).

Proper application of ADA preemption is of critical importance to A4A's members, which rely on ADA preemption to prevent state and local governments, and judicial systems, from constructing a complicated, inconsistent patchwork of regulation. The ADA accomplishes this fundamental goal by prohibiting states and localities from enacting or enforcing laws or regulations "related to" the prices, routes, or services of an airline. Carriers routinely rely on nationally uniform rules governing interstate transportation by air in structuring their business dealings with a variety of third parties, just as Congress envisioned they would. Uncertainty created by inconsistent judicial

rulings regarding the scope of ADA preemption undermines the ability of A4A members to operate efficiently, innovate, plan and make informed decisions about their business relationships. Exposing carriers to local jury verdicts relating to airline prices, routes, or services, as allowed by the Ninth Circuit, would create such uncertainty and conflicts with decisions from this Court and other circuits. Accordingly, authoritative resolution of that conflict by this Court is crucial to A4A's members.

American Trucking Associations, Inc. ("ATA") is the national association of the trucking industry. Its direct membership includes approximately 2,000 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the states. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including on numerous occasions before this Court.

ATA is a District of Columbia non-profit corporation with its headquarters and principal place of business in Arlington, Virginia. ATA does not issue stock, and no publicly held company controls more than 10% of ATA.

ATA has a strong interest in the resolution of this case because the preemption provision that governs the trucking industry, introduced in the 1994 Federal Aviation Administration Authorization Act ("FAAAA"), is identical to that governing the airline industry, and

the interpretation and application of both provisions share a common jurisprudence. *See, e.g.*, *Rowe v. N.H. Motor Trans. Ass'n*, 552 U.S. 364, 370 (2008).[3] The national trucking industry is of massive size and scope and is an essential pillar of the American economy and lifestyle. To efficiently and competitively undertake the millions of daily shipments on which the U.S. economy depends, trucking companies need to employ uniform procedures free of individualized state regulatory requirements that impede the free flow of trucking commerce. An overarching federal regulatory network accompanied by strong federal preemption allows the trucking industry to meet the needs of the American economy. Thus, ATA and its members have a direct and immediate interest in the Court's decision of this matter.

BACKGROUND AND SUMMARY OF ARGUMENT

In the Airline Deregulation Act ("ADA") Congress expressly provided that "no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority to provide

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[3] ATA is currently seeking a writ of certiorari from this Court in another case from the Ninth Circuit, involving the scope of that preemption provision. *American Trucking Assns v. City of Los Angeles*, No. 11-798 (pet. for cert. filed Dec. 23, 2011). In that case, as here, the Ninth Circuit articulated a narrow view of federal preemption that is at odds with Congress's deregulatory intent, and incompatible with this Court's instructions concerning FAAAA and ADA preemption.

air transportation." Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1708 (1978) (currently codified at 49 U.S.C. § 41713(b)(1).[4]

On three separate occasions, this Court has interpreted the ADA preemption provision, each time noting its breadth. In the first case, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the Court held that the provision of the ADA "express[es] a broad pre-emptive purpose" and prohibits all state laws "relating to" the rates, routes or services of an air carrier. This "broadly worded" provision "displaces all state laws that fall within its sphere, even including state laws that are consistent with [the federal Act's] substantive requirements.'" *Id.* at 387. The law's purpose, the Court said, was "[t]o ensure that the States would not undo federal deregulation with regulation of their own . . . ." *Id.* at 378.

Congress expressly endorsed the holding in *Morales* in 1994 when it enacted the recodified Title 49, noting that it "did not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in Morales . . . ." H.R. Conf. Rep. No. 103-677 at p. 83 (1994).

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[4] In 1994 Congress re-codified the language, without making substantive changes. Among other changes, the phrase "a price, route, or service" was substituted for "rates, routes, or services." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995). That year, Congress also introduced a parallel preemption provision prohibiting states from enacting laws related to a motor carrier's prices, routes, and services. Federal Aviation Administration Authorization Act, Pub. L. No. 103-305, tit. VI, § 601(c), 108 Stat. 1569, 1605 (1994).

In *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), the Court reiterated the broad sweep of the ADA's preemption provision. The Court concluded that "the ban on enacting or enforcing any law 'relating to rates, routes, or services,' is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier." *Id.* at 229, n.5.

In the years after *Morales* and *Wolens*, lower courts grappled with the issue of whether the ADA preempted state laws of general application, such as tort law or employment discrimination law. In other words, while it might have been clear that a state could not require an airline to serve coffee to its passengers, there remained a question as to whether an airline might be liable under state tort law if a flight attendant spilled hot coffee on a passenger.

These cases eventually led to two major lines of authority among the Circuit Courts in which the courts diverged over the definition of "service" in the ADA preemption provision. In one line, several circuits opted for a broader reading, holding that "service" included ticketing, boarding procedures, provision of food and drink, and baggage handling as well as transportation itself. See, e.g., *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1257 (11th Cir. 2003); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996).

At the other end of the spectrum, the Ninth Circuit, in *Charas v. Trans World Airlines*, 160 F.3d 1259 (1998), held that "service" referred only to the transportation itself, as in "daily service from Los Angeles to New York." *See also, Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998).

Any doubt on the reach of the ADA preemption provision was resolved when this Court unanimously held in *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), that the Federal Aviation Administration Authorization Act ("FAAAA") preempted a Maine law regulating in-state tobacco shipments. Because the FAAAA preemption clause was patterned after and identical to the ADA language, the Court applied ADA precedent and held that the Maine law was preempted in light of *Morales*.

In *Rowe*, the Court noted that Maine's law would frustrate Congress's preemptive purpose because it "could easily lead to a patchwork of state service-determining laws." *Id.* at 373. The Court also held the ADA does not allow exceptions or exemptions because of the type of state law, or the salutary purpose for the state law's enactment. *Id.* at 373-75.

Rowe should have put an end to the debate over the scope of the ADA preemption provision. *Rowe* implicitly called into question the continuing validity of the *Charas* line of cases because the result in *Rowe* cannot be squared with the narrow definition of "service" found in *Charas*. While the Court did not explicitly define "service" under the ADA preemption provision, it is clear that the Maine regulations at issue there, addressing aspects of the motor carrier's delivery

service, affected something other than carrier prices and routes. Two circuits have concluded that the narrow definition of "service" in *Charas* cannot survive *Rowe*. *Air Transport Ass'n v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008); *DiFiore v. American Airlines, Inc.*, 646 F. 3d 81, 88 (1st Cir. 2011).

The Ninth Circuit, however, continues to apply its parsimonious reading of the ADA provision. The case below is not the only instance of this intransigence. For example, in *American Trucking Assns v. City of Los Angeles,* 660 F.3d 384 (9th Cir. 2011), *petition for cert. filed* (U.S. Dec. 23, 2011) (No. 11-798), the Ninth Circuit created a market participant exception to FAAAA preemption, again following *Charas* and its progeny to narrowly circumscribe the definition of "service." 660 F.3d at 401. In another post-*Rowe* case, *Ventress v. Japan Air Lines*, 603 F.3d 676, 682 (9th Cir. 2010), the Ninth Circuit, holding that the ADA does not preempt state whistle-blower claim, noted that the circuit "has adopted a relatively narrow definition of "service."

The case below is the most recent example of the Ninth Circuit's proclivity to create exceptions to the ADA preemption provision. In addition to its insistence on applying *Charas*, the Ninth Circuit also misread *Wolens* and established a categorical exception for claims alleging a breach of the implied covenant of good faith and fair dealing. In so doing, the Ninth Circuit, in conflict with *Wolens* and decisions in other circuits, created a loophole that threatens to swallow the ADA preemption provision. If this loophole is allowed to stand, juries throughout the vast Ninth Circuit will be free to apply their own form of

regulation to airline prices, routes, and services (and, by extension, to those of motor carriers). The result would be the patchwork of local regulation that Congress prohibited when it deregulated the airline industry.

Review of the Ninth Circuit's decision by this Court is needed to resolve this conflict, clarify the scope of ADA and FAAAA preemption, and establish a single, national preemption standard under these acts. This conflict, on an important and recurring issue of federal law, is intolerable. As Congress recognized in passing the ADA and FAAAA, airlines and motor carriers, by the very nature of their operations, need a single, reliable standard in order to permit vigorous competition and to operate efficiently, safely, and effectively in the public interest.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Continues To Frustrate The Congressional Goal Of Deregulation By Narrowing The ADA Preemption Provision

The decision below was incorrect for a number of reasons, all of which combine to create a narrow view of ADA preemption, which cannot be squared with the controlling decisions of this Court, and which undermines the Congressional goal of deregulation.

A. The Ninth Circuit applied an incorrectly narrow interpretation of the ADA preemption provision.

The decision below makes clear that the Ninth Circuit continues to view the ADA preemption provision through an exceedingly narrow prism, at times completely misreading this Court's teachings.

For example, the circuit court said that in *Morales*, this Court "cabined its holding to those laws that actually have a *direct effect* on rates, routes, or services" and that the Court "went to great lengths to make clear that its holding was narrow and that the ADA only preempts laws that have a *direct effect* on pricing." *Ginsberg v. Northwest, Inc.*, 695 F.3d 873, 877 (9th Cir. 2012) (emphasis added).

This characterization is flatly inconsistent with the plain language of *Morales*, where this Court noted that the language used by Congress in the ADA "express[es] a broad preemptive purpose," has a "broad scope" and "expansive sweep," and is both "deliberately expansive" and "conspicuous for its breadth." 504 U.S. at 383-84.

Morales also did not apply a "direct effect" standard. Instead, this Court held that the ADA preempts any state law having a connection with or reference to an airline's prices, routes, or services, unless that connection or reference is "too tenuous, remote, or peripheral . . . to have preemptive effect." *Id.* at 384, 390.

Clearly, *Morales* did not limit ADA preemption to local regulation that has a "direct effect on pricing." At

issue in *Morales* was not a state attempt to set airline prices. Instead, it was an attempt by state attorneys general to establish guidelines for *advertising about* airline prices. The justification for the states' effort was to avoid deceptive practices in airline price advertising. This Court held that regulation of advertising was "related to" price and therefore preempted. 504 U.S. at 388.

The Ninth Circuit's characterization of *Morales* is also inconsistent with *Rowe*, in which this Court described the *Morales* decision as holding that preemption "may occur even if a state law's effect on rates, routes, or services 'is only indirect'" 552 U.S. at 370. In *Rowe*, this Court emphasized that state actions having a connection with, or reference to carrier prices, routes, or services are preempted. *Id.* There was no requirement that the action have a "direct effect." In fact, the Court noted that the regulation in question was "less 'direct' than it might be[.]" *Id.* at 372. The "relevant inquiry is the effect of the local law," and preemption can occur where the regulation is "direct or indirect[.]" *Id.* at 373.

As discussed *supra,* it is widely recognized outside the Ninth Circuit that the narrow reading of ADA preemption in *Charas* and its progeny is not viable after *Rowe*. As Petitioners herein note, the First and Second Circuit Courts of Appeal and the United States Department of Transportation agree that *Charas* is in conflict with *Rowe*. Pet. at 27-28. See also, Order 2012-1-18, January 23, 2012, Hawaii Inspection Fee Proceeding, Docket DOT-OST-2010-0243 ("[W]e reject Hawaii's contention that the term service in the ADA preemption provision should be construed narrowly

under Ninth Circuit cases such as Charas" and citing to *Rowe* and *ATA v. Cuomo*).

B. The Ninth Circuit misapplied the *Wolens* holding.

In *Wolens,* this Court held that a breach of contract action that seeks only to enforce an airline's self-imposed obligations was not preempted by the ADA even though the action related to an airline's prices. 513 U.S. at 222. In reaching that result, the Court noted that local regulation affecting non-essential airline matters—such as frequent flier programs—are sufficiently "related to" air carriers' prices, routes and services as to be preempted by the ADA. *Id.* at 226-28. The Court also held that the ADA "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement" *Id.* at 232-33. In sum, this Court held, states "may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier," whether by statute or common law or equitable contract doctrines. *Id.* at 229 n.5.

The Court repeatedly stressed that such claims must be limited to the parties' bargain, and cannot be based on external policies or regulation. *See, e.g., id.* at 228 (ADA allows suits "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings"); *id.* ("terms and conditions airlines offer and passengers accept are privately-ordered obligations"); *id.* at 229 ("[a] remedy confined to a contract's terms simply holds parties to their agreements").

The Court recognized that "'[s]ome state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties.'" *Id.* at 233 n.8 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992)). And, the Court found a fraud act claim preempted because statute "does not simply give effect to bargains offered by the airlines and accepted by airline customers"). *Id.* at 228.

In the decision below, however, the Ninth Circuit ignored these limitations and allowed an implied covenant claim to proceed, despite the fact that such a claim necessarily is based on state law policies rather than the parties' bargained-for terms. Incredibly, the Ninth Circuit also found that the claim, which involved the plaintiff's participation in the airline's frequent flyer program, did not "relate to" prices or services. 695 F.3d at 881. Such a finding cannot possibly be squared with *Wolens*, which applied ADA preemption in the identical context – claims relating to a frequent flyer program. 513 U.S. at 227.

The Ninth Circuit's categorical exception for implied covenant claims also conflicts with decisions of several circuits. *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 34-37 (1st Cir. 2007) (finding plaintiffs' implied covenant of good faith claim, among other state law claims, preempted by the ADA); *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609-10 (7th Cir. 2000) (finding fraudulent inducement claim preempted because it "is not . . . a request to enforce the parties' bargains" but is instead "a plea for the court to replace those bargains with something else"); *Data Manufacturing, Inc. v. United Parcel Serv.*, 557 F.3d

849, 853-54 (8th Cir. 2009) (preempting state law claims based on implied contractual obligations).

C. In reaching its holding, the Ninth Circuit erroneously applied a saving clause.

The Ninth Circuit cited to the Federal Aviation Act "savings clause" to support its holding that implied covenant claims are categorically exempted from ADA preemption: "Additionally, that Congress did not intend to preempt state common law contract claims is evident from another provision: the savings clause, which preserves common law remedies." 695 F.3d at 879.

In reaching this conclusion, the Ninth Circuit ignored the fact that this Court rejected a similar argument in *Morales,* calling the 'saving' clause a "relic of the pre-ADA/no preemption regime" and noting that a "general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision. . . [W]e do not believe Congress intended to undermine this carefully drawn statute through a general saving clause." 504 U.S. at 384-5. (citations omitted).

The Ninth Circuit cites to *Wolens* as supporting its view of the saving clause because *Wolens* found contract claims not preempted. 695 F.3d at 880. But the Court did not use the saving clause as the basis for allowing the contract claim to proceed. In fact, the opposite is true. The Court held that another common law remedy – fraud – was preempted. 513 U.S. at 228. The Court had no difficulty prohibiting that common law action despite the saving clause. The Ninth Circuit ignores that distinction.

II. The Ninth Circuit Decision Will Allow Local Regulation Of Airline Prices, Routes, And Services.

As shown *supra,* allowing local communities to impose external obligations or policies through the vehicle of an implied covenant claim would run afoul of *Morales* and *Wolens.*

Allowing local juries, through verdicts on implied covenant claims, to impose their own notions of how airlines should be run will inevitably lead to a patchwork of rules regarding airline prices, routes, and services. This is precisely what Congress forbade when it deregulated the airline and trucking industries. "[T]o interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations. That state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe*, 552 U.S. at 373. For this reason, the issue in this case is of significant importance to the airline and trucking industries, and to interstate commerce in general.

This Court has recognized that the coercive effect of a jury award of damages is tantamount to regulation: "regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247 (1959)).

In the ADA preemption context, the First Circuit noted the risk to uniform regulation of airlines posed by allowing juries to apply inexact standards such as good faith and fair dealing: "it is hard to imagine that Congress would have been happier if, absent detailed guidelines or a law targeting carriers, the states in *Morales, Wolens,* and *Rowe* simply let the jury condemn the same carrier conduct by applying broader statutory terms (*e.g.*, 'unfair' competition or 'deceptive' practices, *Wolens,* 513 U.S. at 227)." *DiFiore v. Amer. Airlines, supra,* 646 F.3d at 87.

In fact, local jury verdicts in implied covenant cases relating to airline prices, routes, or services could be even worse than direct regulation by the state because the prospect of non-uniform regulation would be multiplied exponentially. The First Circuit recognized this when it noted, "[i]f anything, the problem of diverse regimes is even greater than merely allowing fifty states to impose restrictions of their own. In Massachusetts, individual juries would effectively design their own detailed, ad hoc compliance schemes . . ." *Id.* at 88.

That the categorical exemption for implied covenant claims will lead to a patchwork of non-uniform local regulation cannot be disputed. As noted *supra,* several circuits have rejected such an exemption. Further, there is a great deal of variation among the States as to the applicability, nature, and extent of implied covenant claims. See Pet. At 19.

Uniformity of application of the law regarding ADA preemption is extremely important to the airline industry. As Justice O'Connor noted several years

before the Supreme Court decided *Rowe*, "Because airline companies operate across state lines, the divergent pre-emption rules formulated by the Courts of Appeals currently operate to expose the airlines to inconsistent state regulations." *Northwest Airlines v. Duncan*, 121 S. Ct. 650, 651 (2000) (O'Connor, J., dissenting from denial of certiorari in a case questioning the viability of *Charas*). While much progress towards uniformity of application of ADA preemption has been made since Justice O'Connor wrote those words, that progress has occurred outside the confines of the Ninth Circuit. This newest loophole opened by the Ninth Circuit would exacerbate the problem and all but guarantee inconsistent local regulation of airline prices and services.

The issues posed by this case are of vital concern to A4A's and ATA's members. First, because each of A4A's members, and many of ATA's members, do business in the Ninth Circuit, this persisting failure to recognize the broad reach of ADA and FAAAA preemption – a matter of federal law fundamental to the operations of the airline and trucking business – creates unacceptable uncertainty and confusion. More than anything else, A4A's and ATA's members seek a single, clear, and reliable rule of law to which they can look for purposes of planning and compliance.

Second, the substantive rule of law embraced by the Ninth Circuit cedes to every local community the authority to dictate to A4A's and ATA's members matters of service and price related conduct. This reading of the ADA subjects the airlines to precisely the sort of varying, even incompatible, obligations that Congress attempted to avoid when it passed the ADA

(and would do the same to motor carriers under the parallel FAAAA preemption provision). Airlines simply cannot compete as Congress intended, or function as efficient, affordable tools of interstate commerce, if their services or prices are subject to the indirect regulatory dictates of local juries.

CONCLUSION

The prospect of state and local regulations that affect airline prices and services, subject to the shifting political whims of each locality airlines serve, is precisely the danger that led Congress to adopt the ADA's broad preemption provision. Whether accomplished through local legislation, regulation, or a jury verdict, the effect is the same. Without federal preemption, "[t]he likelihood of multiple, inconsistent rules would be a dagger pointed at the heart of commerce—and the rule applied might come literally to depend on which way the wind was blowing." *British Airways Bd. v. Port Authority of New York*, 558 F.2d 75, 83 (2d Cir. 1977). Amici curiae Airlines for America and American Trucking Associations, Inc., respectfully urge this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
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No. 12-462

In the

Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., and DELTA AIR LINES, INC., a Delaware corporation,

Petitioners,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A

Order and Opinion of the United States Court of Appeals for the Ninth Circuit, No. 09-56986 (July 13, 2012) App-1

Appendix B

Opinion of the United States Court of Appeals for the Ninth Circuit, No. 09-56986 (August 5, 2011) App-20

Appendix C

Order of the United States District Court for the Southern District of California Denying Plaintiff's Motion for Reconsideration, No. 09-00028 (October 13, 2009) App-41

Appendix D

Order of the United States District Court for the Southern District of California Granting Defendant's Motion to Dismiss and Dismissing with Prejudice in Part and Without Prejudice in Part, No. 09-00028 (July 8, 2009) App-56

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CLAIFORNIA

No. 09-00028

S. BINYOMIN GINSBERG

Plaintiff,

v.

NORTHWEST, INC., ET AL.

Defendants.

Date Filed	#	Docket Text
1/8/2009	1	COMPLAINT with Jury Demand against all defendants (Filing fee $350 receipt number 158817.), filed by S Binyomin Ginsberg. (ecl) (av1). (Entered: 01/09/2009)
1/09/2009	2	Summons Issued as to Northwest, Inc, Delta Air Lines, Inc. (mkz) (Entered: 01/09/2009)
4/07/2009	3	Joint MOTION for Extension of Time to File *Response to Complaint* by S Binyomin Ginsberg, Northwest, Inc, Delta Air Lines, Inc. (Williams, Richard) (Entered: 04/07/2009)

Date Filed	#	Docket Text
4/08/2009	4	ORDER Granting 3 Joint Motion for Enlargement of Time for Defendants Northwest, Inc. and Delta Air Lines, Inc. to Respond to Complaint: Defendants shall have until 4/17/2009 to respond to the Complaint. Signed by Judge Janis L. Sammartino on 4/8/09. (mkz) (jrl). (Entered: 04/08/2009)
4/17/2009	5	MOTION to Dismiss *Complaint* by Northwest, Inc. (Williams, Richard). Modified on 4/20/2009 - Motion termed. Atty refiled Motion 7 (jah). (Entered: 04/17/2009)
4/17/2009	6	ORDER Setting Briefing Schedule: The Court set a hearing date of 7/23/09 for Defendant's 5 Motion to Dismiss. Responses due by 5/8/2009, Replies due by 5/21/2009. Signed by Judge Janis L. Sammartino on 4/17/09. (mkz) (jrl). (Entered: 04/17/2009)

Date Filed	#	Docket Text
4/17/2009	7	MOTION to Dismiss *Complaint* by Northwest, Inc. (Attachments: #1 Memo of Points and Authorities In Support of Defendants' Motion to Dismiss Complaint, #2 Appendix of Non-Federal Authorities, Part 1, #3 Appendix of Non-Federal Authorities, Part 2) (Williams, Richard) (Entered: 04/17/2009)
5/1/2009	8	SUPPLEMENTAL DOCUMENT by Delta Air Lines, Inc. re 7 MOTION to Dismiss *Complaint Supplemental Appendix of Non-Federal Authorities Cited in Support of Defendants' Motion to Dismiss Complaint.* (Williams, Richard) (mkz). (Entered: 05/01/2009)
		* * *
5/8/2009	11	RESPONSE in Opposition re 7 MOTION to Dismiss *Complaint* filed by S Binyomin Ginsberg. (Attachments: #1 Proof of Service) (Hewell, Harold) (mkz). (Entered: 05/08/2009)
		* * *

Date Filed	#	Docket Text
5/21/2009	14	REPLY to Response to Motion re 7 MOTION to Dismiss *Complaint* filed by Delta Air Lines, Inc. (Williams, Richard) (mkz). (Entered: 05/21/2009)
7/08/2009	15	ORDER Granting Defendant's 7 Motion to Dismiss and Dismissing with Prejudice in Part and Without Prejudice in Part: Defendant's motion to dismiss is granted and the 7/23/09 hearing is vacated. Plaintiff's claims for breach of good faith dealing, negligent misrepresentation, and intentional misrepresentation are dismissed with prejudice. His claim for breach of contract is dismissed without prejudice. If Plaintiff elects to amend his complaint, he shall file the First Amended Complaint within twenty one days of the date this Order is electronically docketed. If Plaintiff fails to file within that time the clerk shall close the file. Signed by Judge Janis L. Sammartino on 7/8/09. (All non-registered users served via U.S. Mail Service). (mkz) (kaj). (Entered: 07/08/2009)

Date Filed	#	Docket Text
7/21/2009	16	MOTION for Reconsideration by S Binyomin Ginsberg. (Attachments: #1 Document withdrawn, #2 Declaration of Plaintiff in Support of Motion) Modified on 7/21/2009 to correct motion type (mkz). Modified on 7/31/2009 to withdraw attachment per 21 Notice (mkz). (Entered: 07/21/2009)
7/21/2009	17	Amended Memorandum of Points and Authorities in Support of 16 MOTION to Alter Judgment : *Filing of Corrected Memorandum of Points and Authorities* by S Binyomin Ginsberg. (Attachments: #1 Declaration of Harold Hewell Regarding Filing of Corrected Memorandum of Points and Authorities, #2 Proof of Service) (Hewell, Harold) Modified on 7/21/2009 to edit event (mkz). (Entered: 07/21/2009)

Date Filed	#	Docket Text
07/21/2009	18	ORDER Setting Briefing Schedule: The Court set a hearing date of 9/10/09 for Plaintiff's 16 Motion for Reconsideration. Any opposition is due 8/6/2009, Replies due by 8/14/2009. Signed by Judge Janis L. Sammartino on 7/21/09. (All non-registered users served via U.S. Mail Service). (mkz) (jrl). (Entered: 07/21/2009)
07/29/2009	19	Ex Parte MOTION to Continue *Deadline to Amend Complaint* by S Binyomin Ginsberg. (Attachments: #1 Declaration of Harold Hewell) (Hewell, Harold) (mkz). (Entered: 07/30/2009)
7/30/2009	20	AFFIDAVIT re 19 Ex Parte MOTION to Continue *Deadline to Amend Complaint: Proof of Service* by Plaintiff S Binyomin Ginsberg. (Hewell, Harold) (mkz). (Entered: 07/30/2009)

Date Filed	#	Docket Text
7/30/2009	21	NOTICE OF WITHDRAWAL OF DOCUMENT by S Binyomin Ginsberg re 16 MOTION for Reconsideration filed by S Binyomin Ginsberg (*Document No. 16-2 only*). (Attachments: #1 Proof of Service) (Hewell, Harold) (mkz). (Entered: 07/30/2009)
7/30/2009	22	ORDER Granting 19 Ex Parte Motion to Continue Deadline for Filing Amended Complaint: The deadline for filing an amended complaint is extended to two weeks after the Court issues an Order resolving the Motion for Reconsideration. Signed by Magistrate Judge Nita L. Stormes on 7/30/09. (All non-registered users served via U.S. Mail Service) (mkz) (jrl). (Entered: 07/30/2009)
8/6/2009	23	RESPONSE in Opposition re 16 MOTION for Reconsideration filed by Northwest, Inc., Delta Air Lines, Inc.. (Williams, Richard) Modified on 8/7/2009 to edit text (mkz). (Entered: 08/06/2009)

Date Filed	#	Docket Text
8/13/2009	24	REPLY to Response to Motion re 16 MOTION for Reconsideration filed by S Binyomin Ginsberg. (Attachments: #1 Proof of Service) (Hewell, Harold) (mkz). (Entered: 08/14/2009)
9/4/2009	25	Minute Entry : Hearing on Motion for Reconsideration 16 set for 9/10/2009 before Judge Janis L. Sammartino is off calendar and taken under submission (acr) (Entered: 09/04/2009)
10/13/2009	26	ORDER Denying Plaintiff's 16 Motion for Reconsideration: Plaintiff may file an amended complaint within fourteen days of the date this Order is electronically docketed. Signed by Judge Janis L. Sammartino on 10/13/09. (All non-registered users served via U.S. Mail Service) (mkz) (kaj). (Entered: 10/13/2009)

Date Filed	#	Docket Text
10/27/2009	27	MOTION Final Order for Purposes of Appeal re 26 Order on Motion for Reconsideration, *Letter dated October 27, 2009* by S Binyomin Ginsberg. (Attachments: #1 Proof of Service) (Hewell, Harold) (mkz). (Entered: 10/27/2009)
10/29/2009	28	MOTION to Dismiss *With Prejudice Plaintiff's Breach of Contract Cause of Action* by Delta Air Lines, Inc., Northwest, Inc. (Williams, Richard) (mkz). (Entered: 10/29/2009)
11/09/2009	29	RESPONSE in Opposition re 28 MOTION to Dismiss *With Prejudice Plaintiff's Breach of Contract Cause of Action* filed by S Binyomin Ginsberg. (Attachments: #1 Proof of Service) (Hewell, Harold) (mkz). (Entered: 11/09/2009)
11/11/2009	30	NOTICE of Voluntary Dismissal of Cause of Action for Breach of Contract by S Binyomin Ginsberg (Attachments: #1 Proof of Service) (Hewell, Harold) Modified on 11/12/2009 to edit text (mkz). (Entered: 11/11/2009)

Date Filed	#	Docket Text
11/13/2009	31	Ex Parte MOTION for Judgment by S Binyomin Ginsberg. (Attachments: #1 Proof of Service) (Hewell, Harold) (mkz). (Entered: 11/13/2009)
11/13/2009	32	REPLY re 28 MOTION to Dismiss *With Prejudice Plaintiff's Breach of Contract Cause of Action*, 29 Response in Opposition to Motion *in Further Support of Request for Dismissal with Prejudice Plaintiff's Breach of Contract Cause of Action* filed by Delta Air Lines, Inc., Northwest, Inc. (Williams, Richard) (mkz). (Entered: 11/13/2009)
11/13/2009	33	ORDER Denying Defendants' 28 Motion to Dismiss with Prejudice and Entering Final Judgment in Favor of Defendants: This matter is concluded and this Order shall serve as the final judgment in favor of Defendants. The Clerk shall close the file. Signed by Judge Janis L. Sammartino on 11/13/09. (All non-registered users served via U.S. Mail Service) (mkz) (kaj). (Entered: 11/13/2009)

Date Filed	#	Docket Text
12/14/2009	34	NOTICE OF APPEAL as to 33 Denying Defendants' Motion to Dismiss with Prejudice and Entering Final Judgment in Favor of Defendants, by S Binyomin Ginsberg. (Filing Fee: Paid, Receipt No. CAS008261). (Notice of Appeal electronically transmitted to US Court of Appeals). (akr) (Entered: 12/15/2009)
12/15/2009	35	USCA Case Number 09-56986 for 34 Notice of Appeal, filed by S Binyomin Ginsberg. (akr) (Entered: 12/15/2009)
12/15/2009	36	USCA Time Schedule Order as to 34 Notice of Appeal, filed by S Binyomin Ginsberg. (akr) (Entered: 12/15/2009)
09/07/2011	37	ORDER of USCA as to 34 Notice of Appeal, filed by S Binyomin Ginsberg. The motions of Air Transport Association of America, Inc. and Cargo Airline Association for leave to file amicus briefs are granted. The briefs received September 6, 2011 are ordered filed. (akr) (Entered: 09/07/2011)

Date Filed	#	Docket Text
09/16/2011	38	ORDER of USCA as to 34 Notice of Appeal, filed by S Binyomin Ginsberg. Appellant is directed to file a response to the petition for rehearing en banc, filed with the USCA on August 25, 2011. Briefing and filing instructions issued. (akr) (Entered: 09/16/2011)
10/13/2011	39	ORDER of USCA as to 34 Notice of Appeal, filed by S Binyomin Ginsberg. Appellant's request for extension of time to respond to the petition for rehearing en banc is granted to November 1, 2011. (akr) (Entered: 10/13/2011)
7/31/2012	40	ORDER of USCA as to 34 Notice of Appeal, filed by S Binyomin Ginsberg. Defendants-Appellees' motion for stay of issuance of the mandate pending application for writ of certiorari is granted. Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court. (akr) (Entered: 07/31/2012)

Date Filed	#	Docket Text
6/17/2013	41	NOTICE from USCA re 34 Notice of Appeal to 9th Circuit. The US Supreme Court granted the petition for a writ of certiorari on 05/20/2013. Supreme Court Number 12-462. (no document attached). (akr) (Entered: 06/17/2013)

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 09-56986

S. BINYOMIN GINSBERG

Plaintiff,

v.

NORTHWEST, INC., ET AL.

Defendants.

Date Filed	#	Docket Text
12/15/2009	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due by Attorney Harold M. Hewell, Attorney due on 12/22/2009. Appellant S. Binyomin Ginsberg opening brief due 03/31/2010. Appellee Delta Air Lines, Inc. and Appellee Northwest, Inc. answering brief due 04/30/2010. Appellant's optional reply brief is due 14 days after service of the answering brief. [7165220] (GR)

* * *

Date Filed	#	Docket Text
04/06/2010	7	Filed order MEDIATION (CLR): Case not selected for mediation program. Counsel interested in obtaining settlement assistance or program information should contact the Mediation Office. [7291535] (KKW)
04/23/2010	8	14 day oral extension by phone of time to file Appellant S. Binyomin Ginsberg brief. Appellant S. Binyomin Ginsberg opening brief due 05/07/2010. Appellee Delta Air Lines, Inc. and Appellee Northwest, Inc. answering brief due 06/07/2010. The optional reply brief is due 14 days after service of the appellee brief. [7312447] (BG)
05/08/2010	9	Submitted (ECF) Opening brief for review. Submitted by Appellant S. Binyomin Ginsberg. Date of service: 05/08/2010. [7330291]--[COURT UPDATE: Attached certificate of compliance from deleted entry. 05/10/2010 by MA] (HMH)

Date Filed	#	Docket Text
05/08/2010	10	COURT DELETED ENTRY. Filing contained only a certificate of service, which has been attached to [9]. Original text: Filed (ECF) Errata to Opening Brief ([9] Brief Submitted for Review (ECF Filing). Filed by Appellant S. Binyomin Gin (HMH)
05/10/2010	13	Filed clerk order: Electronically-filed document [9] Brief Submitted for Review (ECF Filing) is stricken because there is an error in the document: no statement of related cases. [7341536] (GLS)
05/11/2010	11	Court Correction: Added attorney Thatcher Alden Stone for S. Binyomin Ginsberg, in case 09-56986. [7333044] (MA)
05/14/2010	12	Filed (ECF) Appellant S. Binyomin Ginsberg Motion to file substitute or corrected brief. Date of service: 05/14/2010. [7338291] (HMH)
05/18/2010	14	Filed Appellant S. Binyomin Ginsberg excerpts of record in 2 volumes. Served on 05/17/2010. [7343364] (GLS)

Date Filed	#	Docket Text
05/20/2010	15	Submitted (ECF) Opening brief for review. Submitted by Appellant S. Binyomin Ginsberg. Date of service: 05/20/2010. [7345323] (HMH)
05/24/2010	16	Filed clerk order (Deputy Clerk: AMT): Appellant's unopposed motion for leave to file a corrected opening brief is granted. The opening brief submitted on May 15, 2010 is ordered filed. The clerk shall strike the opening brief submitted on May 8, 2010. The answering brief is due June 21, 2010. The optional reply brief is due within 14 days after service of the answering brief. [7347166] (KKW)
05/24/2010	17	Filed clerk order: The opening brief [15] submitted by S. Binyomin Ginsberg is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a blue cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7347253] (GLS)

Date Filed	#	Docket Text
06/02/2010	18	Received 7 paper copies of Opening brief [15] filed by S. Binyomin Ginsberg. [7359164] (SD)
06/15/2010	19	14 day oral extension by phone of time to file Appellees Delta Air Lines, Inc. and Northwest, Inc. brief. Appellee Delta Air Lines, Inc. and Appellee Northwest, Inc. answering brief due 07/06/2010. The optional reply brief is due 14 days after service of the appellee brief. [7373306] (JN)
07/06/2010	20	Submitted (ECF) Answering brief for review. Submitted by Appellees Delta Air Lines, Inc. and Northwest, Inc. Date of service: 07/06/2010. [7394997] (JRN)

Date Filed	#	Docket Text
07/07/2010	21	Filed clerk order: The answering brief [20] submitted by Delta Air Lines, Inc. and Northwest, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7395706] (GLS)
07/08/2010	22	Received 7 paper copies of Answering brief [20] filed by Delta Air Lines, Inc. and Northwest, Inc. [7399098] (SD)
07/20/2010	23	Oral extension by phone of time to file S. Binyomin Ginsberg optional reply brief. Appellant S. Binyomin Ginsberg reply brief due 08/03/2010. [7411983] (LN)
08/03/2010	24	Submitted (ECF) Reply brief for review. Submitted by Appellant S. Binyomin Ginsberg. Date of service: 08/02/2010. [7427604] (HMH)

Date Filed	#	Docket Text
08/04/2010	25	Filed clerk order: The reply brief [24] submitted by S. Binyomin Ginsberg is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a gray cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7427949] (GLS)
08/10/2010	26	Received 7 paper copies of Reply brief [24] filed by S. Binyomin Ginsberg. [7434856] (SD)
04/28/2011	27	Notice of Oral Argument on JUNE Calendar. Please return ACKNOWLEDGMENT OF HEARING NOTICE form to: PASADENA Office. Attention: The Notice of Docket Activity may not list your case number. Please open attached documents to view details about your case. [7733913] (LN)
06/09/2011	28	ARGUED AND SUBMITTED TO ROBERT R. BEEZER, STEPHEN S. TROTT and PAMELA ANN RYMER. [7779702] (LN)

Date Filed	#	Docket Text
08/05/2011	29	FILED OPINION (ROBERT R. BEEZER, STEPHEN S. TROTT and PAMELA ANN RYMER) REVERSED AND REMANDED. Judge: RRB Authoring, Judge: PAR Concurring. FILED AND ENTERED JUDGMENT. [7845338] (RP)
08/17/2011	30	Filed (ECF) Appellees Delta Air Lines, Inc. and Northwest, Inc. Motion to extend time to file petition for rehearing until 08/26/2011 at 08:00pm. Date of service: 08/17/2011. [7862264] (JRN)
08/18/2011	31	Filed clerk order (Deputy Clerk: LC): Granting Appellees Delta Air Lines, Inc. and Northwest, Inc.'s (ECF Filing) 7-day motion to extend time to file petition for rehearing. Petition for rehearing and/ or rehearing en banc is due on or before 08/26/2011. [7863155] (LC)

Date Filed	#	Docket Text
08/26/2011	32	Filed (ECF) Appellees Delta Air Lines, Inc. and Northwest, Inc. petition for panel rehearing and petition for rehearing en banc (from 08/05/2011 opinion). Date of service: 08/26/2011. [7873474] (JRN)
09/06/2011	33	COURT DELETED INCORRECT ENTRY. Correct Entry: [35]. Original Text: Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Air Transport Association of America, Inc. Date of service: 09/06/2011. [7883066] (RS)
09/06/2011	34	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Cargo Airline Association. Date of service: 09/06/2011. [7883555] (RNB)
09/06/2011	35	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Air Transport Association of America, Inc. Date of service: 09/06/2011. [7883582] (RS)

Date Filed	#	Docket Text
09/07/2011	36	Entered appearance of Amicus Curiae - Pending Cargo Airline Association. [7884210] (TB)
09/07/2011	37	Entered appearance of Amicus Curiae Pending Air Transport Association of America, Inc.. [7884220] (TB)
09/07/2011	38	Filed order (ROBERT R. BEEZER, STEPHEN S. TROTT and PAMELA ANN RYMER) The motions of Air Transport Association of America, Inc. and Cargo Airline Association for leave to file amicus briefs are GRANTED. The briefs received September 6, 2011 are ordered filed. [7884710] (KKW)
09/08/2011	39	Filed clerk order: The amicus brief [34] submitted by Cargo Airline Association 9/6/11 is filed. No paper copies of this brief are required. [7885398] (LC)
09/08/2011	40	Filed clerk order: The amicus brief [35] submitted by Air Transport Association of America, Inc. 9/6/11 is filed. No paper copies of this brief are required. [7885402] (LC)

Date Filed	#	Docket Text
09/16/2011	41	Filed order (ROBERT R. BEEZER, STEPHEN S. TROTT and PAMELA ANN RYMER) Appellant is directed to file a response to the petition for rehearing en banc, filed with this court on August 25, 2011. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [7896706] (KKW)
10/07/2011	42	Filed (ECF) Appellant S. Binyomin Ginsberg Motion to extend time to comply with the order dated 09/16/2011. Date of service: 10/07/2011. [7921337] (HMH)

Date Filed	#	Docket Text
10/11/2011	43	Filed (ECF) Appellees Delta Air Lines, Inc. and Northwest, Inc. Correspondence: Appellees do not oppose the motion filed by the Appellant on October 7, 2011, requesting an adjournment of the response date. Date of service: 10/11/2011 [7923280] (CGK)
10/13/2011	44	Filed order (ROBERT R. BEEZER and STEPHEN S. TROTT) Appellant's request for extension of time to respond to the petition for rehearing en banc is GRANTED to November 1, 2011. [7926009] (BJB)
11/02/2011	45	Filed (ECF) Appellant S. Binyomin Ginsberg response to Combo PFR Panel and En Banc (ECF Filing), Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing, for panel and en banc rehearing (statistical entry), Order. Date of service: 11/02/2011. [7950698]. (HMH)
11/04/2011	46	Filed clerk order (Deputy Clerk: BJB): Due to the death of Judge Rymer, Judge Schroeder has been drawn in her place. [7954860] (BJB)

Date Filed	#	Docket Text
07/13/2012	47	FILED ORDER AND OPINION (MARY M. SCHROEDER, ROBERT R. BEEZER and STEPHEN S. TROTT) REVERSED AND REMANDED. The opinion filed August 5, 2011, slip op. 10231, and appearing at 653 F.3d 1033 (9th Cir. 2011), is hereby withdrawn. A new opinion is filed concurrently with this order. The panel voted to deny defendants-appellees' petition for rehearing, and recommended denying the petition for rehearing en banc. The full court has been advised of the new opinion and defendants-appellees' petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Defendants-appellees' petition for panel rehearing and petition for rehearing en banc are denied. Judge: RRB Authoring, FILED AND ENTERED JUDGMENT. [8249510] (RP)

Date Filed	#	Docket Text
07/19/2012	48	Filed (ECF) Appellees Delta Airlines, Inc. and Northwest, Inc. Motion to stay the mandate. Date of service: 07/19/2012. [8256777] (JRN)
07/30/2012	49	Filed (ECF) Appellant S. Binyomin Ginsberg response opposing motion (motion to stay the mandate). Date of service: 07/30/2012. [8269097] (HMH)
07/31/2012	50	Filed order (MARY M. SCHROEDER, ROBERT R. BEEZER and STEPHEN S. TROTT) Defendants-Appellees' motion for stay of issuance of the mandate pending application for writ of certiorari is GRANTED. Fed. R. App. P. 41(b). Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court. Fed. R. App. P. 41(d)(2). [8269260] (KKW)

Date Filed	#	Docket Text
10/18/2012	51	Received notice from the Supreme Court: petition for certiorari filed on 10/11/2012. Supreme Court Number 12-462. [8367712] (RR)
06/17/2013	52	Received notice from the Supreme Court. Petition for certiorari GRANTED on 05/20/2013. Supreme Court Number 12-462. [8669099] (RR)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 1:09-CV-0028-NLS

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,

Plaintiff,

vs.

NORTHWEST, INC., a Minnesota corporation and a wholly-owned subsidiary of Delta Air Lines, Inc., and **DELTA AIR LINES, INC.**, a Delaware Corporation,

Defendants.

January 8, 2009

COMPLAINT FOR:

(1) BREACH OF CONTRACT;

(2) BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING;

(3) NEGLIGENT MISREPRESENTATION; AND

(4) INTENTIONAL MISREPRESENTATION

Class Action

Jury Trial Requested

Plaintiff alleges:

I. PARTIES

1. Plaintiff Rabbi S. Binyomin Ginsberg is an individual consumer and a citizen of Minnesota. He brings this action as an individual, and on behalf of all others similarly situated. Plaintiff respectfully requests a jury trial.

2. Defendant Northwest, Inc. ("Northwest") is a Minnesota corporation and a wholly-owned subsidiary of Delta Air Lines, Inc. Northwest lists with the California Secretary of State a principal place of business located at 2700 Lone Oak Parkway, Eagan, Minnesota 55121-1534, and a registered agent for service of process by the name of CT Corporation System, 818 West Seventh Street, Los Angeles, California 90017. Thus, for purposes of diversity jurisdiction, Northwest can be considered a "citizen" of Minnesota.

3. Defendant Delta Air Lines, Inc. ("Delta") is a Delaware corporation which lists with the California Secretary of State its principal place of business address as P.O. Box 45852, Atlanta, Georgia 30320, and a registered agent for service of process by the name of Corporation Service Company Which Will Do Business in California as CSC-Lawyers Incorporating Service 2730 Gateway Oaks Drive, Suite 100, Sacramento, California 95833. Thus, for purposes of diversity jurisdiction, Delta can be considered a citizen of Delaware or Georgia.

II. VENUE AND JURISDICTION

4. This Court enjoys jurisdiction over the subject matter presented by this Complaint because

it is filed as a class action arising under the Class Action Fairness Act ("CAFA") of 2005, 28 U.S.C. § 1332(d)(2) and 28 U.S.C. § 1332(d)(6), which explicitly provides for original jurisdiction in the Federal Courts of any class action in which any member of the plaintiff Class is a citizen of a state different from any defendant, and in which the matter in controversy exceeds in the aggregate the sum of $5,000,000.00, exclusive of interest and costs. Plaintiff alleges that the total claims of individual class members in this action are in the excess of $5,000,000.00 in the aggregate as required by 28 U.S.C. § 1332(d)(2), (5). Plaintiff is a citizen of Minnesota; Delta, for purposes of diversity jurisdiction, can be considered a citizen of either Delaware or Georgia. Therefore, diversity of citizenship exists under CAFA as required by 28 U.S.C. § 1332(d)(2). Furthermore, pursuant to 28 U.S.C. § 1332(d)(4)(a)(i)(I), plaintiff alleges that more than two-thirds of all of the members of the proposed plaintiff Class in the aggregate are citizens of a state other than California, where this action is originally being filed, and that the total number of members of the proposed plaintiff Class is greater than 100, as required by 28 U.S.C. § 1332(d)(5)(B).

5. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) because defendant may be found in, conducts business in, and is subject to personal jurisdiction in this district.

III. GENERAL ALLEGATIONS

6. All allegations in this Complaint are based on information and belief and/or are likely to

have evidentiary support after reasonable opportunity for further investigation or discovery.

7. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, the defendants and each of their related entities was the agent, servant and employee of each of the other entities, and at all times herein mentioned, each was acting within the purpose and scope of said agency and employment. Plaintiff is further informed and believes and thereon alleges that, at all times herein mentioned, each of those entities' employees was the agent, servant and employee of each employee's respective employer, and at all times herein mentioned, each employee was acting within the purpose and scope of said agency and employment. Whenever reference in this Complaint is made to any act or transaction of either of the defendants, such allegations shall be deemed to mean that the principals, officers, directors, employees, agents, and/or representatives of that respective defendant committed, knew of, performed, authorized, ratified and/or directed such act or transaction on behalf of that respective defendant while actively engaged in the scope of their duties.

IV. FACTUAL ALLEGATIONS

8. According to a report filed October 31, 2008, with the U.S. Securities and Exchange Commission, Northwest and Delta merged on October 29, 2008, and as a result of that merger, Northwest became a wholly-owned subsidiary of Delta. The merger was the result of an Agreement

and Plan of Merger the parties had entered into, dated April 14, 2008.[1]

9. Also as a result of that merger, Delta became the world's largest airline, with hubs in Atlanta, Cincinnati, Detroit, Memphis, Minneapolis-St. Paul, New York-JFK, Salt Lake City and Tokyo-Narita. Delta and its Northwest subsidiary now offer service to more than 375 destinations in 66 countries, and serve more than 170 million passengers each year.

10. The merger purportedly preserved Northwest's customer loyalty program, known as "WorldPerks." An October 29, 2008 press release announcing the merger stated that there would be "immediate complimentary upgrade reciprocity for *elite* members of both airlines' loyalty programs, with airport lounge reciprocity continuing as usual."[2] A website by Northwest, explaining the effect of the merger on Northwest customers, stated: "During the regulatory review period, *it is business as usual—with no changes to the WorldPerks program*. After the merger closes, customers will be able to fly to more destinations.... *This transaction will have no impact on WorldPerks miles or elite status* (emphasis added throughout)."[3]

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[1] Form 8-K, DELTA AIR LINES INC /DE/ -DAL, Filed: October 31, 2008 (period: October 29, 2008).

[2] Press Release dated October 29, 2008 titled "Delta and Northwest Merge, Creating Premier Global Airline."

[3] http://www.nwa.com/features/mergerqa/.

11. The representations made by the defendants, as set forth in the two preceding paragraphs, are false, as shown below.

12. Plaintiff has long been a customer of Northwest, and has been a member of the WorldPerks loyalty program ("Program") since 1999. As Dean of Torah Academy of Greater Minneapolis, a parochial Primary and Middle school and a member-school of Torah U'mesorah, and international association of Jewish day schools, he has achieved widespread recognition for his accomplishments in education and administration. He travels extensively throughout the United States and abroad for speaking engagements, to conduct seminars and workshops, and to advise other educators and administrators. As a result of that extensive travel, plaintiff achieved Platinum Elite status in the Program in 2005.

13. Prior to moving to Minneapolis, plaintiff and his wife had lived in Seattle, Washington. Air travel in and out of Minneapolis and Seattle was dominated by Northwest; while living in these cities, plaintiff and his wife readily qualified as "frequent fliers," entitled to benefits under the loyalty Program: they logged, on average, approximately 75 flights on Northwest each year. As of this filing, plaintiff and his wife continue to fly frequently, at approximately the same rate, and do so almost exclusively on Northwest.

14. Despite their frequent flights on Northwest and their loyalty to the airline, Northwest has arbitrarily rescinded plaintiff's Platinum Elite status in the Program. This occurred less than three

months after defendants entered into the Agreement and Plan of Merger, dated April 14, 2008, and approximately four months before the merger became final.

15. On Friday, June 27, 2008, while plaintiff and his wife were driving from Detroit to Chicago, he received a call on his cell phone from a Northwest representative who told him that Northwest was revoking his Platinum Elite status because he had purportedly "abused" the Program. Northwest had given plaintiff no prior notice that he had done anything to endanger his program status, or that his Program status was at risk. In fact, at the time he received this call, his Platinum Elite card was valid through February 2009. Plaintiff asked the representative to explain the alleged "abuse," and was told the airline had determined that he had called the Customer Care line with complaints "too many times," that he had been bumped from flights "too often," and that he had purposely booked reservations on "full flights" with the intention of getting bumped.

16. Plaintiff asked the Northwest agent for her name and phone number so that he could call her back when he was not driving and had access to his Program records. The representative said that her name was Irene James, but she refused to give him a phone number, stating that there was nothing more to discuss and that she would not be speaking to him again. Ms. James told plaintiff he would receive a letter from Northwest's Customer Care department within a few days officially revoking his status, and

explaining in detail what he had done to warrant the revocation.

17. The next week, after returning home, plaintiff contacted Northwest's legal department about the revocation. He spoke with Chris Jenkins Weiner, who agreed to look into it. Ms. Weiner called plaintiff back the next day and told him that Northwest had "the right" to terminate his Program membership "at any time," and that the termination "was fair." Ms. Weiner continued, adding that Northwest also was revoking the Silver Elite Program status earned by plaintiff's wife. Ms. Weiner claimed that plaintiff had been called once prior to June 27, 2008 and had been warned of Northwest's intent to revoke his Program status because of the alleged abuses. Like Ms. James, Ms. Weiner assured plaintiff that Northwest was sending a letter to formally notify plaintiff and his wife of the revocations. Plaintiff had received no warnings and told this to Ms. Weiner. Her reply was not responsive: she claimed plaintiff had "violated" before the June 27, 2008 call from Ms. James, and told him the forthcoming letter would explain the basis for Northwest's action.

18. The promised correspondence had not arrived as of July 13, 2008, when plaintiff was scheduled to fly from Minneapolis/St. Paul to New York JFK. Plaintiff arrived early to the airport and decided to wait for his flight at Northwest's WorldClub at Minneapolis/St. Paul Airport in the C concourse. He had renewed and paid for his WorldClub membership on June 18, 2008, and no one, including Ms. Weiner and Ms. James, had told

him that revocation of his Program status would affect his WorldClub membership. However, when plaintiff presented his WorldClub card to the receptionist, he was denied entry and was told that his WorldClub membership had been cancelled with his Platinum Elite status because he had paid for the renewed membership at the Platinum Elite discounted price. The Northwest representative told plaintiff that because he no longer held Platinum Elite status, the WorldClub membership was invalid. This was incorrect, of course, because he had paid for his WorldClub membership on June 18, 2008, nine days before Ms. James called him and first raised the revocation of his status. Plaintiff's Platinum Elite status was in effect when he paid for the WorldClub membership, and he was entitled to the discount that came with that status.

19. Plaintiff was allowed to enter the WorldClub after an extended discussion with the agent in charge. However, the humiliation he experienced because of the incident prevented him from enjoying his WorldClub membership or any other aspects of travel with Northwest from that point forward, as he was concerned that a similar incident could occur at any time.

20. On July 23, 2008, plaintiff received another call on his cell phone from Ms. James. She warned him that if any more of his friends called Northwest and questioned his treatment at the hands of the airline, Northwest would provide them with details regarding his alleged abuse of Program privileges (details that, ironically, Northwest has to date withheld from him). Ms. James said she had

checked with the airline's legal department and had been told that divulging these allegations to third parties was permitted, as long as she first warned plaintiff.

21. During that conversation, plaintiff asked that he be given opportunity to discuss the allegations against him when he had access to his records. Ms. James told him that she would call him at 2:00 p.m. CDT, July 25, 2008, for that purpose. However, she did not do so.

22. Plaintiff continued to wait for Northwest's promised letter, hoping it would shed light on the alleged abuses of the Program, as well as provide written confirmation of his Program status.

23. Plaintiff subsequently received a letter dated July 18, 2008, from Kathy Johnston, coordinator of Customer Care at Northwest. It stated in part that: "[d]ue to our past generosity, we must respectfully advise that we will no longer be awarding you compensation each time you contact us .... If compensation is warranted and provided to other passengers for issues like a flight irregularity, you will receive like consideration" A true and correct copy of the letter from Ms. Johnston is attached to this Complaint as Exhibit "A" and incorporated by reference.

24. There was no reference in the Johnston letter to the revocation of the Program status plaintiff had enjoyed for many years. Northwest representatives had assured plaintiff that a forthcoming letter would provide the factual basis for Northwest's revocation and clarify the state of his

and his wife's membership status in the Program, but the Johnston letter contained no such information.

25. Plaintiff spent the next two months trying to ascertain the relationship, if any, that he and his wife had with Northwest. However, he received nothing but inconsistent information from Ms. Weiner, Ms. James, and Ms. Johnston.

26. In August 2008, a Minnesota attorney wrote Northwest's legal department on plaintiff's behalf in an effort to resolve the impasse, but Northwest did not respond.

27. Plaintiff, who was still maintaining a heavy fight schedule on Northwest, was frustrated with the uncertainty of his Program status. After nine years of active participation in the Program, with his loyalty benefits, rights and privileges defined by written agreements, Northwest had "revoked" his status with a call to his cell phone. The letter from Ms. Johnston was the only letter he had received since that call, and it did nothing to resolve the uncertainty of his Program status, or that of his wife.

28. Plaintiff continued to seek clarification of his status with Northwest, and on November 20, 2008, he received an email from Kathy Johnston stating in part:

> Please allow me to review Rule #7 of our WorldPerks Terms and Conditions.
>
> Rule #7 states the following.
>
> "Abuse of the WorldPerks program (including failure to follow program policies and procedures, the sale or barter of awards

> or tickets and any misrepresentation of fact relating thereto or other improper conduct as determined by Northwest in its sole judgment, including, among other things, violation of the tariffs of Northwest or any Airline Partner participant in the program, any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees; instructions) may result in cancellation of the members' account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards. Any violation of these rules may result in confiscation of tickets at any time (including en route) and the payment by the WorldPerks member or passenger of the full applicable Y, C, J, F or P Fare for any segment traveled on program award tickets that have been misused. In connection with the enforcement of any of the terms and conditions governing the WorldPerks program, Northwest Airlines reserves the right to take appropriate legal action, as it deems necessary, and to recover damages, attorneys (sic) fees and court costs.

A true and correct copy of the email, redacted to maintain the privacy of email addresses, is attached to this Complaint as Exhibit "B" and incorporated by reference. A true and correct copy of the "WorldPerks® General Membership Terms and Conditions" (http://www.nwa.com/worldperks/memrules/general.shtml) is attached to this

Complaint as Exhibit "C" and incorporated by reference.

29. Neither the November 20, 2008, email from Kathy Johnston nor any other communication from Northwest specified exactly what plaintiff had allegedly done to violate "Rule #7." Given that plaintiff has neither engaged in, nor been accused of, "failure to follow program policies and procedures" or "the sale or barter of awards or tickets and any misrepresentation of fact relating thereto," plaintiff can only conclude that Northwest was asserting that he had engaged in "other improper conduct *as determined by Northwest in its sole judgment,* including, among other things ... untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees' instructions ... (emphasis added)."[4]

30. However, this provision of the Terms and Conditions is so impossibly vague and ambiguous that no reasonable Program member could ever know what is required to comply with it. "Other improper conduct" is not defined, except as

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[4] Without clarifying plaintiff's Program status, rights and privileges in any manner in the email, Ms. Johnston concluded with, "We believe that we have fully addressed your concerns, and communicated your change in status with our program. Continued disregard of the policies of this program may result in the termination of your WorldPerks account." Without that clarification, plaintiff still had no indication of what he was doing to violate "the policies of this program" or what Northwest expected of him in terms of compliance. He did not know if he had been relegated to a lesser status in the Program, or removed from it entirely.

("including, among other things") "untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees' instructions." However, "untoward or harassing behavior" is undefined as well; ambiguity is defined with ambiguity. Northwest compounds the uncertainty by broadly asserting that "improper conduct" is to be "determined by Northwest in its sole judgment...."

31. Northwest cannot contend that plaintiff's service complaints and queries constituted "improper conduct," as he sought nothing more than was promised in Northwest's "Customer Service Commitments," a part of the airline's "Customers First" program. The "commitments" are incorporated into Northwest's Contract of Carriage. A true and correct copy of the "Customer Service Commitments" (http://www.nwa.com/plan/guide01.html) is attached to this Complaint as Exhibit "D" and incorporated by reference.

32. Additionally, it must be noted that plaintiff's complaints were legitimate, as evidenced by the compensation given and actions taken by Northwest in response to those complaints. Furthermore, plaintiff was not the only Northwest customer who had complaints. A brief review of the Internet reveals a multitude of Northwest customers complaining of similar problems.[5]

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[5] See, e.g.: http://www.consumeraffairs.com/travel/northwest_airlines.htm; http://www.my3cents.com/showReview.cgi?id=6070;

33. By plaintiff's estimate, only about 10 percent of the many Northwest flights he and his wife have taken resulted in problems warranting a call to Northwest's Customer Care. If, as Ms. James asserted, plaintiff complained "too many times," it is because he and his wife fly Northwest frequently; the more they fly, the greater their exposure to problems. The number and frequency of complaints correlate with their loyal, frequent use of Northwest. The complaints do not evidence "abuse," they only show that plaintiff uses the airline often. However, rather than rewarding this loyalty (the purported purpose of the Program), Northwest chose instead to penalize them for registering the complaints that logically arise from frequent flying.[6]

34. Furthermore, the incidents Northwest cites to bolster its allegation of "abuse" involve circumstances under the sole control of the airline. Plaintiff has no influence or control over Northwest's internal booking policies that result in overbooked

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http://www.theimagelab/com/blog/2005/05/25/northwest-airlines-sucks/;
http://www.my3cents.com/showReview.cgi?id=30806;
http://blogcritics.org/archives/2006/11/04/101053.php; and
http://www.all-encompassingly.com/northwest-airlines-is-bankrupt/.

[6] It should be noted that Ms. Johnston's letter addressed a six-month period when plaintiff and his wife had encountered an unusually high number of problems with Northwest, a period that constituted less than 9 percent of their time as Program members. It is no coincidence that this was a time in which the airlines were facing problems industry-wide, including rising fuel costs and a higher rate of flight cancellations.

flights. Yet, Northwest blames *plaintiff* for being "bumped" excessively.[7] It is absurd on its face that Northwest cites this as abusive behavior on the plaintiff's part, when he was the one inconvenienced by Northwest's policies.

35. Additionally, the validity of plaintiff's complaints is evidenced by Northwest's response to them. As Ms. Johnston stated in her letter to plaintiff:

> I have reviewed the text of all your telephone calls, as well as our responses. I believe our staff has attempted to show you in their words and actions that we are truly sorry your travel has not gone smoothly. *Because of the nature of our industry, there will continue to be inconveniences caused to our passengers. You certainly deserve our apologies on these occasions.*

Ex. A, ¶ 2 (emphasis added).

36. If Northwest later came to believe it had compensated plaintiff excessively, this again was in the sole control of Northwest. It is an internal matter; plaintiff did not set compensation levels.

37. According to the 2008 North American Airline Satisfaction Study℠, released June 17, 2008, by J.D. Power and Associates,[8] Northwest tied for last

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[7] Again, it should be noted that if plaintiff was in fact bumped a large number of times, it merely correlates with his heavy use of the airline, which sets the booking policies.

[8] J.D. Power and Associates is a global marketing information services company that performs market research, forecasting,

place in a survey of customer satisfaction with eight traditional network carriers. A true and correct copy of the survey, with press release (http://www.jdpower.com/corporate/news/releases/pdf/2008069.pdf) is attached to this Complaint as Exhibit "E."

38. Plaintiff contends that his complaints were legitimate, and well within the expectations created by the service standards established in Northwest's "Customer Service Commitments," which, as noted above, are incorporated into Northwest's Contract of Carriage.

39. Plaintiff is informed and believes, and thereon alleges, that the revocation of his Program status (which to date has not been confirmed, defined or explained in writing) was nothing more than a pretext for cost-cutting in advance of the Delta merger; that defendants sought to lower their costs by revoking Program benefits, rights and privileges from Program members who asserted those benefits, rights and privileges.

40. As a result of Northwest's actions outlined above, plaintiff has suffered damages in an amount to be determined at trial, as he wrongfully has been deprived of valuable Program benefits that were and are rightfully his, including, but not limited to, flight upgrades, accumulated mileage, loyalty program status or benefits on other airlines, and

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performance improvement, training and customer satisfaction surveys. The firm's quality and satisfaction measurements are based on responses from millions of consumers annually.

other advantages that came with his status in the Program.

V. CLASS ALLEGATIONS

41. Pursuant to Federal Rule of Civil Procedure 23, plaintiff brings this action against the defendants on behalf of himself and all other Program members whose Program status was revoked without valid cause during the class period, which is defined as the four years preceding the filing date of this Complaint. The practices and omissions of defendants were applied uniformly to all members of the Class, so that the questions of law and fact are common to all members of the Class. All putative Class members were and are similarly affected by having had their Program status revoked, and the relief sought herein is for the benefit of plaintiff and members of the putative class. Plaintiff is informed and believes, and on that basis alleges, that the plaintiff Class is so numerous that joinder of all members would be impracticable. Based on the number of Program members, it is apparent that the number of parties subjected to the practices complained of here is substantial, thereby making joinder impossible.

42. Questions of law and fact common to the plaintiff Class exist that predominate over questions affecting only individual members, including, inter alia, the following:

a. Whether defendants breached their written contract with Program members by revoking their Program status without valid cause, thereby depriving them of the rights,

privileges and benefits related to their status;

b. Whether defendants breached the covenant of good faith and fair dealing inherent in their contract with Program members, by revoking their Program status without valid cause, thereby depriving them of the rights, privileges and benefits related to their Program status;

c. Whether defendants' advertising, marketing and/or representations, contractual and other, regarding the Program was negligently deceptive to consumers;

d. Whether defendants' advertising, marketing and/or representations, contractual and other, regarding the Program was intended to deceive consumers;

e. Whether plaintiff and members of the Class suffered an ascertainable loss;

f. Whether any ascertainable loss suffered by plaintiff and members of the Class is the result of defendants' wrongful conduct;

g. Whether equitable relief is an appropriate remedy;

h. Whether punitive damages are an appropriate remedy; and

i. The measure of damages.

43. The claims asserted by plaintiff in this action are typical of the claims of the members of the plaintiff Class, as the claims arise from the same

course of conduct by defendants, and the relief sought is common.

44. Plaintiff will fairly and adequately represent and protect the interests of the members of the plaintiff Class. Plaintiff has retained counsel competent and experienced in both consumer protection and class action litigation.

45. Certification of this class action is appropriate under FRCP 23(b) because the questions of law or fact common to the respective Class members predominate over questions of law or fact affecting only individual members. This predominance makes class litigation superior to any other method available for the fair and efficient adjudication of these claims. Absent a class action, it would be highly unlikely that the representative plaintiff or any other Class member would be able to protect their own interests, because the cost of litigation through individual lawsuits might exceed expected recovery. Certification also is appropriate because defendants acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole. Further, given the large number of consumers of the Product, allowing individual actions to proceed in lieu of a class action would run the risk of yielding inconsistent and conflicting adjudications.

46. A class action is a fair and appropriate method for the adjudication of the controversy, in that it will permit a large number of claims to be resolved in a single forum simultaneously, efficiently, and without the unnecessary hardship that would

result from the prosecution of numerous individual actions and the duplication of discovery, effort, expense and burden on the courts that such individual actions would engender. The benefits of proceeding as a class action, including providing a method for obtaining redress for claims that it would not be practicable to pursue individually, outweigh any difficulties that might be argued with regard to the management of this class action.

VI. FIRST CAUSE OF ACTION

BREACH OF WRITTEN CONTRACT

(Against All Defendants)

47. Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

48. Plaintiff and Class members have tendered performance and/or have substantially performed all of their obligations under their written Program contracts.

49. As detailed above, defendants have failed to perform in accordance with the Program contract, revoking the Program statuses of plaintiff and Class members without valid cause.

50. Plaintiff and the Class members have suffered actual damages in an amount to be determined at trial, as they wrongfully have been deprived of valuable Program benefits that were and are rightfully theirs, including, but not limited to, flight upgrades, accumulated mileage, loyalty program status or benefits on other airlines, a.d

other advantages that came with their status in the Program.

51. Defendants' breaches are the actual and proximate cause of the damages suffered by plaintiff and the Class members.

52. Plaintiff and the Class members are therefore entitled to: damages in an amount to be determined at trial in an amount sufficient to compensate them for the lost benefits, rights and privileges of their Program membership status; an order of this Court restoring to them the Program membership status they held prior to revocation; and an order of this Court enjoining defendants from the future revocation, without valid cause, of the Program statuses of Program members. The threat of such future revocations exists. There is no means available here to establish a remedy by way of damages for the future losses of plaintiff, Class members and members of the general public if the revoked Program statuses are not restored and future revocations without valid cause are not enjoined. Plaintiff, Class members and members of the general public may be irreparably harmed and/or denied an effective and complete remedy if orders restoring the revoked Program statuses and enjoining future revocations without valid cause are not granted. Plaintiff and the Class members also respectfully request such other relief as the Court may deem proper.

VII. SECOND CAUSE OF ACTION

BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

(Against All Defendants)

53. Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

54. Plaintiff and Class members have tendered performance and/or have substantially performed all their obligations under the Program contracts.

55. The duty of good faith and fair dealing is implied in the subject contracts.

56. Under this implied term of the agreements, the good faith requirement precludes any action by the defendants that would contravene the reasonable expectations of the plaintiff and Class members; even where a party to a contract is given absolute discretion, it must exercise that discretion in good faith in a manner consistent with the reasonable expectations of the other party or parties.

57. Defendants are bound by the standardized terms of their Program contracts with plaintiff and the Class members. All such terms relevant to the claims set forth herein are identical in all material respects and have the same meaning in all jurisdictions. Plaintiff and Class members are entitled to have defendants apply those contracts in a reasonable manner consistent with the expectations created by those contracts and other representations.

58. By virtue of the conduct set forth above, defendants deprived plaintiff and Class members of the benefit of their bargain, and breached the implied covenant of good faith and fair dealing inherent in their contracts.

59. Defendants' breaches are the actual and proximate cause of the damages suffered by plaintiff and the Class members.

60. Plaintiff and the Class members are therefore entitled to: damages in an amount to be determined at trial in an amount sufficient to compensate them for the lost benefits, rights and privileges of their Program membership status; an order of this Court restoring to them the Program membership status they held prior to revocation; and an order of this Court enjoining defendants from the future revocation, without valid cause, of the Program statuses of Program members. The threat of such future revocations exists. There is no means available here to establish a remedy by way of damages for the future losses of plaintiff, Class members and members of the general public if the revoked Program statuses are not restored and future revocations without valid cause are not enjoined. Plaintiff, Class members and members of the general public may be irreparably harmed and/or denied an effective and complete remedy if orders restoring the revoked Program statuses and enjoining future revocations without valid cause are not granted. Plaintiff and the Class members also respectfully request such other relief as the Court may deem proper.

VIII. THIRD CAUSE OF ACTION

NEGLIGENT MISREPRESENTATION

(Against All Defendants)

61. Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

62. Defendants represented to Program members that they had certain rights, benefits and privileges as the result of their Program status, and that these would not be affected by the merger with Delta.

63. Defendants' representations were untrue in that defendants deprived certain Program members of the rights, benefits and privileges related to their Program status by revoking their Program statuses without valid cause; actions which plaintiff on information and belief alleges was part of a program to reduce costs for the merger with Delta.

64. Defendants made the representations herein alleged with the intention of inducing plaintiff and Class members to fly on their airline instead of other airlines, and to do so frequently.

65. Plaintiff and the Class believed and relied on defendants' representations and, in reliance on those representations, loyally and frequently flew on defendants' airline, paying defendants a substantial amount of money in the process. This reliance was reasonable, in that defendants appeared to be reputable and trustworthy.

66. At the time defendants made the misrepresentations herein alleged, defendants had no

reasonable grounds for believing the representations to be true.

67. As a proximate result of defendants' negligent misrepresentations, plaintiff and the Class members are therefore entitled to: damages in an amount to be determined at trial in an amount sufficient to compensate them for the lost benefits, rights and privileges of their Program membership status; an order of this Court restoring to them the Program membership status they held prior to revocation; and an order of this Court enjoining defendants from the future revocation, without valid cause, of the Program statuses of Program members. The threat of such future revocations exists. There is no means available here to establish a remedy by way of damages for the future losses of plaintiff, Class members and members of the general public if the revoked Program statuses are not restored and future revocations without valid cause are not enjoined. Plaintiff, Class members and members of the general public may be irreparably harmed and/or denied an effective and complete remedy if orders restoring the revoked Program statuses and enjoining future revocations without valid cause are not granted. Plaintiff and the Class members also respectfully request such other relief as the Court may deem proper.

IX. FOURTH CAUSE OF ACTION

INTENTIONAL MISREPRESENTATION

(Against All Defendants)

68. Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

69. Defendants represented to Program members that they had certain rights, benefits and privileges as the result of their Program status, and that these would not be affected by the merger with Delta.

70. Defendants' representations were untrue in that defendants deprived certain Program members of the rights, benefits and privileges related to their Program status, without good cause; actions which plaintiff on information and belief alleges was part of a program to reduce costs for the merger with Delta.

71. Defendants made the representations herein alleged with the intention of inducing plaintiff and Class members to fly on their airline instead of other airlines, and to do so frequently.

72. Plaintiff and the Class believed and relied on defendants' representations and, in reliance on those representations, loyally and frequently flew on defendants' airline, paying defendants a substantial amount of money in the process. This reliance was reasonable, in that defendants appeared to be reputable and trustworthy.

73. At the time defendants made the misrepresentations herein alleged, defendants knew the representations were false.

74. As a proximate result of defendants' fraud as alleged herein, plaintiff and the Class members are therefore entitled to: damages in an amount to be determined at trial in an amount sufficient to compensate them for the lost benefits, rights and privileges of their Program membership status; an order of this Court restoring to them the Program membership status they held prior to revocation; and an order of this Court enjoining defendants from the future revocation, without valid cause, of the Program statuses of Program members. The threat of such future breaches exists, and there is no means available here to establish a remedy for such future breaches by way of damages. Plaintiff, Class members and members of the general public may be irreparably harmed and/or denied an effective and complete remedy if such an order is not granted. Plaintiff and the Class members also respectfully request such other relief as the Court may deem proper.

75. Plaintiff is informed and believes and thereon alleges that defendants knew that the aforementioned representations were false when made and intended that plaintiff and members of the Class should rely on the representations. Plaintiff and the Class members reasonably relied on defendants' representations, all to their damage as hereinabove alleged. In doing the things aforementioned, defendants were guilty of malice, oppression, and fraud, and plaintiff and the Class

are, therefore, entitled to recover exemplary or punitive damages.

X. PRAYER FOR RELIEF

WHEREFORE, plaintiff, on behalf of himself and all others similarly situated, and for members of the general public, prays for relief as follows:

(a) For an order certifying that this action may be maintained as a class action;

(b) For an order restoring to plaintiff and Class members the Program statuses they held prior to revocation;

(c) For an order enjoining defendants from future revocations of the statuses of Program members without valid cause;

(d) For an award of compensatory damages and any additional, consequential and incidental damages and costs suffered by plaintiff and members of the Class due to defendants' wrongful conduct;

(e) For an award of punitive damages for the Fourth Cause of Action;

(f) For an award of prejudgment interest, attorney's fees, costs of suit, including expert witness fees; and

(g) For such other and further legal and equitable relief as this Court may deem proper.

HEWELL LAW FIRM

s/Harold M. Hewell

By: Harold M. Hewell

Dated: January 4, 2009

EXHIBIT A

NWA KLM SkyTeam

Northwest Airlines, Inc.
Customer Care
Depart ment [illegible print]
7500 Airline Drive
Minneapolis, MN 55450-1101
nwa.com

July 18, 2008 REF [REDACTED]

SENT VIA FEDERAL EXPRESS

Mr. Sholom Ginsberg
[REDACTED]

Dear Mr. Ginsberg:

It has been brought to my attention that you have contacted our office 24 times since December 3, 2007 regarding travel problems, including 9 incidents of your bag arriving late at the luggage carousel. We have also received calls from you acting as a representative for Rafaella Ginsberg and Tzvi Ginsberg. As a result, I want to take this opportunity to extend to you, on behalf of all employees at Northwest Airlines, our sincere apology for the many problems you have encountered with our service.

I have reviewed the text of all your telephone calls, as well as our responses. I believe our staff has attempted to show you in their words and actions that we are truly sorry your travel has not gone smoothly. Because of the nature of our industry, there will continue to be inconveniences caused to our passengers. You certainly deserve our apologies on these occasions.

Since December 3, 2007, you have continually asked for compensation over and above our guidelines. We have awarded you $1,925.00 in travel credit vouchers, 78,500 WorldPerks bonus miles, a voucher extension for your son, and $491.00 in cash reimbursements. These incidents certainly deserve an apology and we thank you for bringing them to our attention.

Due to our past generosity, we must respectfully advise that we will no longer be awarding you compensation each time you contact us. We will record your complaints so they receive internal attention and we will respond to you accordingly. If compensation is warranted and provided to other passengers for issues like a flight irregularity, you will consider like consideration.

We value your business and want to do a good job for you. If you have any questions, you may email me directly at Kathy.johnston@nwa.com

Thank you for your understanding.

Sincerely,

s/Kathy M. Johnston

Kathy M. Johnston
Coordinator
Customer Care

EXHIBIT B

[REDACTED]

--Original Message--
From: [REDACTED]
Sent: Friday, November 21, 2008 3:13 AM
To: [REDACTED]
Subject: Fw: WorldPerks Elite Status [REDACTED]

Sent from my BlackBerryR smartphone with SprintSpeed

--Original Message--
From: Northwest Airlines
<Northwest.Airlines@nwa.com>
Date: Thu, 20 Nov 2008 15:19:29
To: [REDACTED]
Subject: WorldPerks Elite Status [REDACTED]

Dear Mr. Ginsberg:

Thank you for your recent email. I appreciate the opportunity to follow up with you.

While we appreciate your business, we must also enforce the WorldPerks program terms and conditions. My records show our WorldPerks staff called you on June 26, 2008 advising you they were rescinding your Elite status and they asked you to return your Platinum card. As of this date, I understand the card has never been returned. I also understand you have had many conversation with our Legal Department on this same subject. After numerous conversations with not only the Legal Department, but with members of the WorldPerks department, I believe your status with the program should be very clear.

Please allow me to review Rule #7 of our WorldPerks Terms and Conditions. Rule #7 states the following.

> "Abuse of the WorldPerks program (including failure to follow program policies and procedures, the sale or barter of awards or tickets and any misrepresentation of fact relating thereto or other improper conduct as determined by Northwest in its sole judgment, including, among other things, violation of the tariffs of Northwest or any Airline Partner participant in the program, any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees; instructions) may result in cancellation of the members' account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards. Any violation of these rules may result in confiscation of tickets at any time (including en route) and the payment by the WorldPerks member or passenger of the full applicable Y, C, J, F, or P fare for any segment traveled on program award tickets that have been misused. In connection with the enforcement of any of the terms and conditions governing the WorldPerks program, Northwest Airlines reserves the right to take appropriate legal action, as it deems necessary, and to recover damages, attorneys fees and court costs."

It has also been brought to my attention that you requested a Continental Platinum Elite card through their other airline match program. Because you were not a Northwest Platinum Elite member when you faxed them your Northwest card and requested the matching Continental Platinum Elite card, Continental has also revoked your card and asked that it be returned. That card has not been returned and, in fact, you attempted to use it several times recently while traveling on Northwest.

We believe that we have fully addressed your concerns, and communicated your change in status with our program. Continued disregard of the policies of this program may result in the termination of your WorldPerks account.

Thank you for writing.

Sincerely,

Kathy Johnston
Coordinator
Customer Care
Northwest Airlines

Dear Ms. Johnston

I received your letter dated July 18, 2008 and I am writing to seek clarification as to my Platinum status. Can you please be so kind and inform me of why my status has been removed? My worldperks number is [REDACTED].

Thanks,

Sholom Ginsberg

[REDACTED]

********** [REDACTED]

EXHIBIT C

WorldPerks General Membership Terms and Conditions

Home – Login – Ask a Question – Worldwide Sites

NWA WorldPerks SkyTeam

Member's Guide > Membership Terms and Conditions

WorldPerks General Membership Terms and Conditions

Program Terms and Conditions

1. Northwest Airlines® has the right to terminate the WorldPerks® program at any time.
2. Northwest may change the WorldPerks program rules, regulations, benefits, conditions of participation or mileage levels for awards, tickets and cities served, in whole or in part, at any time without notice, even though changes may affect the value of the mileage already accumulated. Northwest may change or terminate program partners, withdraw, limit, modify or cancel any award, increase the mileage required for any award, modify or regulate the transferability of awards or benefits, add an unlimited number of blackout dates or limit the number of seats available to any or all destinations. Northwest has the final say as to whether an itinerary qualifies for WorldPerks travel awards.
3. WorldPerks miles have no expiration date. However, consistent with the general terms and conditions of the WorldPerks program, Northwest Airlines reserves the right to change the WorldPerks program at any time without

notice, including imposition of expiration limits or reactivation fees. If no mileage from any source is posted to a WorldPerks member's account for three consecutive years, the account is subject to termination, including forfeiture of all accrued mileage.

4. Northwest reserves the right to make WorldPerks Bonus Miles and promotional offers available to select members based on flight activity, geographic location, program participation or information supplied by the member.

5. All mileage and subsequent awards must be earned and used according to the terms and conditions of the WorldPerks program. Northwest has the right to make the final decision on whether an itinerary qualifies for WorldPerks travel awards.

6. As a condition of membership, WorldPerks members may receive WorldPerks mileage statements, WorldPerks program updates and other related materials at Northwest's discretion. Northwest reserves the right to cease mailing of WorldPerks program updates and related materials to any WorldPerks member.

7. Abuse of the WorldPerks program (including failure to follow program policies and procedures, the sale or barter of awards or tickets and any misrepresentation of fact relating thereto or other improper conduct as determined by Northwest in its sole judgment, including, among other things, violation of the tariffs of Northwest or any partner airline participant in the

program, any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees' instructions) may result in cancellation of the member's account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards. Any violation of these rules may result in confiscation of tickets at any time (including en route) and the payment by the WorldPerks member or passenger of the full applicable Y, C, J, F or P fare for any segment traveled on program award tickets that have been misused. In connection with the enforcement of any of the terms and conditions governing the WorldPerks program, Northwest Airlines reserves the right to take appropriate legal action, as it deems necessary, and to recover damages, attorneys' fees and court costs.

8. Northwest reserves the right to interpret and apply the policies and procedures communicated in these terms and conditions. All determinations by Northwest shall be final and conclusive in each case. These terms and conditions supersede all previously published terms and conditions.

9. Allow six to eight weeks for all mileage to be credited to your WorldPerks account.

10. From time to time, the data you have furnished to Northwest and KLM may be provided to WorldPerks Partners in the travel industry to enhance your travel experience and may be used to bring you relevant and valuable offers from these WorldPerks Partners. If you no longer wish

to receive these communications, please contact the WorldPerks Service Center at 1-800-44PERKS.

11. Except as otherwise explained below, mileage credit is not transferable and may not be combined among WorldPerks members or conveyed by any means to anyone, including through a member's estate, and may not pass to members' successors and assigns. Accrued mileage credit and award certificates and award tickets do not constitute property of the member. Neither accrued mileage, award certificates nor tickets are transferable by the member (i) upon death, (ii) as part of a domestic relations matter or (iii) otherwise. Mileage earned from another frequent flyer program cannot be transferred to the WorldPerks program.

Enrollment

12. The WorldPerks program is open to any individual with a mailing address in North America or in any country that has not prohibited participation in frequent flyer programs, with the exception of countries in Europe, Africa, the Middle East and the Indian Subcontinent. If you change your mailing address to Europe, Africa, the Middle East or the Indian Subcontinent, you can no longer earn miles in the WorldPerks program. Instead, your account should be transferred to KLM's Flying Blue Program. Once you change your address in WorldPerks Manage my Reservations, a card will be sent to your new address so that we may obtain the necessary signature. After the consent

is received, existing mileage balances will be transferred to your new, or existing, Flying Blue account.

13. Corporations or other legal entities cannot be enrolled as members.
14. Only one person may be enrolled per WorldPerks account. An individual may have only one account and that must be in his/her real (legal) name. Membership will be listed under the participant's full name including title (Mr., Ms., etc.) and middle initial. To receive flight credit, the name on the ticket must match the name on the member's account exactly.
15. Membership is non-transferable.
16. Retroactive credit will not be given for flights taken prior to enrollment.

Earning Flight Miles

17. Mileage accrual is based on the nonstop mileage between your origin and destination for each segment of the trip. A segment is defined as all travel under a single flight number. On connecting flights that require a change of plane and flight number, credit is given for each segment of the trip.
18. When making flight reservations, please confirm the airline is Northwest or a Northwest WorldPerks Airline Partner. Northwest is not responsible for notifying members of changes in partner participation in the WorldPerks program. List of WorldPerks Airline Partners.
19. Only published fares on Northwest, our SkyTeam® Global Alliance Partners or other

WorldPerks Airline Partners (and on NWA WorldVacations unpublished fare types) qualify for mileage credit with the exception of travel on these fare types: frequent flyer program/discounted award travel, CATY international, VUSA, standby, infant, some select unpublished fares, some student fares, free, no value, bulk tickets, agency/industry discount tickets, back-to-back tickets, tickets booked and ticketed at select ARC locations and any other fares that are from time to time declared by Northwest to be (i) eligible for mileage accrual at a reduced rate or (ii) ineligible for mileage accumulation.

20. Last Minute Packages fares and some unpublished fares will earn 250 Bonus Miles per segment.

21. Flight cancellations due to any condition that Northwest, our SkyTeam Global Alliance Partners and/or other WorldPerks Airline Partners cannot control, including but not limited to weather delays, will not be granted award mileage credit. Passengers are entitled to mileage credit when rerouted on another carrier due to operational reasons which occur at the airport on the day of travel. The member may earn mileage credit for the original NW/KLM itinerary as ticket by requesting and completing a mileage credit request form.

22. You must actually travel to earn WorldPerks flight mileage. Miles will not be awarded on unused, forfeited, fraudulent or refunded tickets, or on additional tickets purchased on the same

flight under the same name for any reason. Only the person named on the WorldPerks account and who actually flies can earn WorldPerks mileage, even if they purchase tickets for other people. Miles will not be awarded when a person checks in and improperly identifies under the same name as the member. Any fraudulent activity in connection with the program will * * * [MISSING TEXT] cancel previously issued tickets, awards and certificates. An individual member may earn miles only once and in one frequent flyer program for the entire itinerary. Miles will not be awarded for extra seats purchased by such member for any reason.

23. In case of upgrades to First or Business Class, WorldPerks mileage credit will be awarded based on the purchased fare and not on the actual class of service flown.

24. While Northwest, our SkyTeam Global Alliance Partners and our other WorldPerks Airline Partners make every attempt to provide accurate credit or mileage, it is the member's responsibility to retain necessary documents, such as boarding passes and ticket receipts, to be provided for retroactive credit.

Earning WorldPerks Mileage Partner Miles

25. WorldPerks Mileage Partners, partner locations and partner offers are subject to change and termination, without notice, by Northwest or its partners. Northwest assumes no liability for these changes or for informing members of changes. Members should confirm partner status

when making reservations or prior to completing transactions.

26. Some WorldPerks Mileage Partners allow members to convert points to WorldPerks miles. For Point-To-Miles conversions, miles cannot be converted back to points at any time for any reason.

Redeeming Miles for WorldPerks Award Travel

27. All award travel must be via the routes of Northwest Airlines and World Perks Airline Partners. Awards may be limited to select routes or Northwest coded affiliate flights. Please refer to the Redeem Miles section for full details.

28. Award travel has no cash value and will not be refunded.

29. Mileage award levels are subject to change at any time without notice. Travel restrictions to certain destinations and additional blackout dates may be announced by Northwest at any time without notice. PerkSaver℠ Awards are limited and subject to seat availability. These awards may not be available at peak times to prime destinations. Increased availability is offered through the PerkPass ℠ Award pricing option.

30. Partially or wholly unused award tickets, to remain valid, must be exchanged within 90 days after the date of the first unflown flight. Unless exchanged as provided above, the ticket will have no value. More than one exchange per ticket may be made, if done in compliance with the foregoing rules. A non-refundable WorldPerks

administrative fee will apply, per person, for each award ticket exchange. Administrative fees, per person, per ticket, are payable for changes involving a Northwest Agent, changes to a paper award ticket, or for changes made at nwa.com. Fees may vary in amount and will be USD. Platinum members are exempt from all fees except the fee to change the award from an E-Ticket to a paper ticket. Details.

31. If the first departure date on the ticket is missed, the wholly unused award ticket may be redeposited up to 90 days after the first departure date on the original ticket. Once travel has begun, no redeposit may be made. Miles can only be redeposited into the account from which they were redeemed. A non-refundable WorldPerks administrative redeposit fee per person, per ticket applies. All fees will be USD. Platinum members are exempt from this fee. Details.

32. Award tickets (including upgrades with miles) issued for someone other than the account holder via a Northwest Reservations agent or at an airport location within 10 days or less of the travel date will be subject to a non-refundable $50 USD WorldPerks administrative fee per person. The trip summary and receipt will be delivered to the account holder's address. This fee is exclusive of other applicable taxes and fees (including Customs, inspection, immigration, security, agriculture, facility and departure/arrival charges, any administrative

fee, and the September 11th U.S. Security Fee of up to $10 USD roundtrip) Details.

33. The sale, purchase, brokerage, resale, barter or exchange of WorldPerks award tickets or WorldPerks miles for compensation is expressly prohibited. Any violation of these rules will result in confiscation of tickets at any time (including en route), the payment by the WorldPerks member or the passenger of the full applicable Y, C, J, F or P fare for any segment traveled, the payment of damages, attorneys' fees and court costs, closure of the WorldPerks account, and forfeiture of miles accrued and unused awards that have been earned.

34. You are responsible for paying all applicable taxes and fees (including Customs, inspection, immigration, security, agriculture, facility and departure/arrival charges, any administrative fee, and the September 11th U.S. Security Fee of up to $10 USD roundtrip) and obtaining necessary travel documents for award travel. A non-refundable ticketing fee will apply to tickets issued via a Northwest Reservations call center or airport location, fee amounts may vary. In addition, a non-refundable fee of $50 USD per ticket will be charged for passengers who request paper tickets in E-Ticket eligible markets. A credit card will be required at time of booking to pay for any applicable fees and taxes.

35. Award travel that encounters a delay or cancellation by Northwest will be reaccommodated on Northwest, Continental, Delta or KLM, according to Northwest

guidelines, with the following exception: if reaccommodation on Northwest, Continental, Delta or KLM is not available, off-line reaccommodation options will be offered to WorldPerks Elite members and customers traveling on the last flight of the day where the only alternative is an overnight stay.

Redeeming Miles for WorldPerks Upgrade Awards on Northwest/KLM

36. The ticketing of an upgrade award option will be determined by the rules of the purchased fare and ticket designator. Be sure to advise your reservation agent if you have already purchased a ticket. Administrative fees, ticketing fees or departure fees may apply.

37. Upgrade options are valid for most members traveling on most published fare types (and on many NWA WorldVacations unpublished fare types) except for the following: frequent flyer program free/discounted award travel, VUSA passes, Visit USA fare, Round-The-World, Circle-The-Pacific, infant/child, Asian origin spouse fare, companion fares, Asian consolidator ID tickets, denied boarding compensation, free, no value, agency/industry discount tickets, charter flight tickets, senior discount tickets, student fares, Fly Later-Fly Free vouchers, CATY International, most unpublished fares, consolidator tickets issued on 01298 ticket stock, bulk tickets, any certificates, coupons, Bonus Miles or promotional offer/tickets, Northwest trans-Atlantic fares beginning with M/H/Q/V/L/T/K and Northwest trans-Pacific

fares beginning with M/H/Q/V/L/T/K. Upgrades on NWA WorldVacations fares are handled by NINA WorldVacations, not WorldPerks.

38. Upgrading to J or P class is excluded when using WorldPerks upgrade awards.

39. Select or most Coach fares on trans-Atlantic and trans-Pacific flights may be upgraded to D or I class; only full-fare tickets can be upgraded to Z class.

40. WorldPerks mileage upgrades for trans-Atlantic and trans-Pacific itineraries are only available on eligible paid Northwest Y and B type fares, Continental Y and H type fares, and on KLM S and B type fares.

41. Upgrade awards do not apply to side trips or other fares sold in conjunction with award travel.

42. Upgrades, like all awards, cannot be ticketed in Central or South America, the South Pacific, Europe, Africa, the Middle East, the Indian Subcontinent or elsewhere in the Atlantic region.

43. WorldPerks non-Elite members may not use miles to upgrade to First Class on domestic itineraries when purchasing Northwest T and K type fares or Continental V, Q, T, S and L type fares. Northwest will determine the eligibility of new fare types as they become available.

44. If you have upgraded your paid ticket with WorldPerks miles and decide to downgrade the ticket back to Economy class, you may apply the value of your paid ticket toward the price of any new itinerary, and it will be subject to any applicable WorldPerks administrative fees as

well as any applicable change fees associated with the paid ticket.

* * *

EXHIBIT D

Northwest Airlines nwa.com – "Customers First" Customer Guide

Home – Login – Ask a Question – Worldwide Sites

NWA SkyTeam

Customers First > Customer Service Guide

"Customers First" — Customer Service Commitments

Northwest Airlines will:

1. Offer you the lowest fare available for which you are eligible for the date, flight and class of service you request when you call Northwest's telephone reservation line, or book travel and/or purchase a ticket at a Northwest airport.
2. Notify you in a timely manner at the airport and on board an affected aircraft of known delays, cancellations and diversions. And will offer you a clear and concise statement of our policies for how we will accommodate you if you are delayed.
3. Make every reasonable effort to return lost checked luggage within 24 hours and will attempt to contact any customer whose unclaimed checked luggage contains a name and address or phone number.
4. Offer liability limit for luggage on domestic flights of $3,000.
5. Allow you to cancel a reservation without penalty through midnight the next day to give you an opportunity to check for lower fares through other distribution systems such as

travel agents or the Internet. *Note: Midnight the next day is defined as midnight in the first city of the itinerary. Passenger is scheduled to depart from San Diego. The Customer has until midnight Pacific time the next day to cancel.*

6. Issue refunds for eligible tickets within 7 days for credit card purchases and 20 days for cash purchases.
7. Properly accommodate customers with disabilities and special needs, and will disclose our policies and procedures for handling special needs customers, such as Unaccompanied Minors and customers with disabilities.
8. Meet your essential needs during long delays, and will make every reasonable effort to provide for food, water, restroom facilities and access to medical treatment for customers aboard an aircraft that is on the ground for an extended period of time.
9. Handle "bumped" customers with fairness and consistency. And will disclose to you, upon request at the time of ticketing, whether the flight on which you are ticketed is overbooked.
10. Disclose travel itinerary, cancellation policies, frequent flyer rules and aircraft configuration by disclosing to you:
    - At the time you make your reservation, any change of aircraft on a single flight with the same flight number.
    - Cancellation policies involving failures to use each flight segment coupon.

- Rules, restrictions and an annual report on Northwest's WorldPerks frequent flyer program redemption.
- Upon request, information regarding aircraft configuration, including seat size and pitch.

11. Ensure our codeshare partners make a commitment to provide consumer plans and policies comparable to the Northwest Customers First standards.
12. Ensure that you receive a response to your written complaints within 60 days of their receipt by our Customer Care department.

These 12 commitments have been incorporated into NWA's Contract of Carriage.

Purchase tickets online at www.nwa.com, call Northwest Airlines at 1-800-225-2525 (TTY 1-800-328-2298) or call your travel agent.

* * *

PETITIONER'S BRIEF

RECORD AND BRIEF

Supreme Court, U.S.
FILED
JUL 24 2013
OFFICE OF THE CLERK

No. 12-462

In the
Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., and DELTA AIR LINES, INC., a Delaware corporation,

Petitioners,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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July 24, 2013

QUESTION PRESENTED

The Airline Deregulation Act of 1978 includes a preemption provision providing that States "may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

Respondent was a member of Northwest Airlines' frequent flyer program, which by its terms permitted Northwest to remove participants for "abuse" of the program as determined in Northwest's "sole judgment." After Northwest revoked respondent's Platinum Elite status membership due to abuse of the program, respondent filed suit alleging, *inter alia*, that Northwest breached both its contractual obligations and an implied covenant of good faith and fair dealing under Minnesota law. Although the district court dismissed the contract claim for failure to state a claim and the implied covenant of good faith and fair dealing claim as preempted by the ADA, the Ninth Circuit reversed as to the implied covenant claim, finding such claims categorically unrelated to a price, route or service notwithstanding this Court's decisions in *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992), and *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

The question presented is:

Did the court of appeals err by holding, in conflict with the decisions of other Circuits, that respondent's implied covenant of good faith and fair dealing claim was not preempted under the ADA because such claims are categorically unrelated to a

price, route, or service, notwithstanding that respondent's claim arises out of a frequent flyer program (the precise context of *Wolens*) and manifestly enlarged the terms of the parties' voluntary undertakings, which allowed termination in Northwest's sole discretion.

PARTIES TO THE PROCEEDING

Petitioners, who were the defendants-appellees below, are Northwest Airlines, Inc. and Delta Air Lines, Inc. Respondent, who was plaintiff-appellant below, is Rabbi S. Binyomin Ginsberg. Respondent seeks to represent a class composed of all other members of Northwest Airlines, Inc.'s frequent flyer program, WorldPerks, whose program status was allegedly revoked without valid cause during the four years prior to the filing of the complaint.

CORPORATE DISCLOSURE STATEMENT

Petitioners, which are private, non-governmental parties, hereby disclose and state that (a) on December 31, 2009, Northwest Airlines, Inc. was merged with and into Delta Air Lines, Inc. Prior to that date, it was a wholly-owned subsidiary of Delta Air Lines, Inc., and no other publicly held corporation owned ten percent or more of Northwest Airlines, Inc.'s stock; and (b) Delta Air Lines, Inc. has no parent corporation and there are no publicly held corporations that own ten percent or more of Delta Air Lines, Inc.'s stock.

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OPINIONS BELOW

The Ninth Circuit's initial opinion reversing dismissal of the complaint and remanding to the district court is reported at 653 F.3d 1033 and reproduced at Pet. App. 20-40. The Ninth Circuit's order denying the petition for rehearing or rehearing en banc and attaching an amended opinion is reported at 695 F.3d 873 and reproduced at Pet. App. 1-19. The district court's opinion granting petitioners' motion to dismiss the complaint is unreported and reproduced at Pet. App. 56-73. The district court's opinion denying respondent's motion for reconsideration is unreported and reproduced at Pet. App. 41-55.

JURISDICTION

The Ninth Circuit denied Northwest's petition for rehearing and rehearing en banc on July 13, 2012. The petition for a writ of certiorari was filed on October 11, 2012, and granted on May 20, 2013. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C § 41713, is reproduced in the appendix to this brief.

STATEMENT OF THE CASE

In 1978, Congress enacted the Airline Deregulation Act (ADA) in order to promote efficiency and innovation in the airline industry through maximum reliance on competitive market forces. To that end, the ADA expressly preempts any "law, regulation, or other provision having the force and

effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). This Court has held complaints about frequent flyer programs to be related to prices, routes, or services, *see American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995), and emphasized the "broad preemptive purpose" of that provision, *Morales v. Trans World Airlines*, 504 U.S. 374, 383-84 (1992). Applying those principles, this Court has recognized that "routine breach-of-contract claims" that do no more than enforce the parties' voluntary undertakings do not trigger preemption, while claims seeking an "enlargement or enhancement" of the parties' bargain based on "state laws or policies external to the agreement" remain preempted by the ADA. *Wolens*, 513 U.S. at 232-33.

In this case, respondent Binyomin Ginsberg brought both kinds of claims against petitioners after his Platinum Elite status membership in Northwest's frequent flyer program was revoked for abuse of the program. The district court held that his "routine breach-of-contract claim" was not preempted under *Wolens* but failed on the merits because the program's terms and conditions clearly and expressly provide that Northwest may revoke program membership if it believes in its "sole judgment" that a member has abused the program. The district court then rejected his separate claim for breach of the implied covenant of good faith and fair dealing (as well as two other counts) as preempted because it sought to alter and expand the parties' voluntary undertakings based on state-law policies external to the contract.

Ginsberg appealed the dismissal of his implied covenant claim (but not the dismissal of his breach of contract claim) and the Ninth Circuit reversed. The Ninth Circuit applied its own precedent to deem Ginsberg's claim (and all implied covenant claims) not related to petitioners' prices or services and therefore not preempted.

A. The ADA and This Court's ADA Preemption Cases

The Federal Aviation Act of 1958 (FAA) gave the federal government, through the Civil Aeronautics Board, the authority to regulate interstate airfares and take action against certain airline practices. The FAA did not expressly preempt state regulation and indeed contained a savings clause providing that "[n]othing ... in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute." Thus, during the regulatory era, states remained free to regulate intrastate airfares and enforce their own laws against airline practices. *See Morales*, 504 U.S. at 378.

In 1978, Congress enacted the Airline Deregulation Act (ADA) with the purpose of furthering "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive market forces and on actual and potential competition." 49 U.S.C. § 40101(a)(6), (12)(A). Although Congress retained the FAA's savings clause, it added an express preemption provision "[t]o ensure that the States would not undo federal deregulation with regulation of their own," *Morales*, 504 U.S. at 378. That provision as originally drafted preempted "any law, rule,

regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *Id.* at 383 (quotation marks omitted). Then, in 1994, Congress recodified the provision without substantive change to provide that a State "may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).[1]

This Court has addressed the preemptive scope of the ADA on two prior occasions. In *Morales v. Trans World Airlines*, the Court held that the ADA preempts States from prohibiting deceptive airline fare advertisements through enforcement of their general consumer protection statutes. Explaining that the phrase "relating to" reflects the ADA's "broad pre-emptive purpose," 504 U.S. at 383, the Court concluded that the preemption provision encompasses all state laws "having a connection with or reference to" airline rates, routes, or services, *id.* at 384, even if the state law's effect on rates, routes, or services "is only indirect," *id.* at 386 (quotation mark omitted). The Court also rejected petitioners' appeal to the pre-ADA savings clause included in the FAA. *Id.* at 384. That general provision was a "relic

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[1] This Court expressly recognized in *Wolens* that this recodification effected no substantive change. *See* 513 U.S. at 222-23 & n.1; *see also* H.R. Conf. Rep. No. 103-677, at 83 (1994) (explaining that Conference Committee "intend[ed] no substantive change to the previously enacted preemption provision," and "d[id] not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in" *Morales*); *accord, e.g., Brown v. United Airlines, Inc.*, ___ F.3d ___, 2013 WL 3388904, at *5 (1st Cir. 2013).

of the pre-ADA/no pre-emption regime" that could not "supersede the specific substantive pre-emption provision" Congress later passed. *Id.* at 385. The Court indicated, however, that the ADA does not preempt state laws that affect prices, routes, or services in only a "tenuous, remote, or peripheral ... manner," such as state laws criminalizing gambling or prostitution or prohibiting obscenity in advertising. *Id.* at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1990)).

Three years later, the Court considered *American Airlines, Inc. v. Wolens*, a class action suit challenging efforts by American Airlines to make retroactive changes to its frequent flyer program. The Court began by noting that the suit so obviously "relat[ed] to" the airline's rates and services that it "need not dwell on the question." 513 U.S. at 226. The Court dwelled instead on the "other words" in "the ADA's preemption clause ... in need of interpretation, specifically, the words 'enact or enforce any law.'" *Id.*

The Court then held that the ADA preempted plaintiffs' claim under an Illinois consumer fraud statute because the statute "does not simply give effect to bargains offered by the airlines and accepted by airline customers"; rather, it was a means to "guide and police the ... practices of the airlines." *Id.* at 228. But the Court held that the ADA did not preempt the plaintiffs' claim for breach of contract, because that claim sought recovery "solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* The "terms and conditions airlines offer and passengers accept are privately

ordered obligations," and a "remedy confined to a contract's terms" does not enforce state law but rather "simply holds parties to their agreement." *Id.* at 229. The critical distinction was not between claims that sound in contract rather than tort, but between "routine breach-of-contract" claims that seek the enforcement only of "self-imposed undertakings" and claims that seek an "enlargement or enhancement" of the parties' bargain based on "state laws or policies external to the agreement." *Id.* at 232-33.

The Court has also construed the scope of a similar preemption provision in the Federal Aviation Administration Authorization Act (FAAAA) that prohibits States from enacting or enforcing any law "related to" a motor carrier's "price, route, or service," 49 U.S.C. § 14501(c)(1). In *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008) the Court observed that Congress borrowed the language in the FAAAA's preemption provision from the ADA and intended that the two provisions be interpreted in the same way. *Id.* at 370. It then held preempted a Maine law forbidding any person from knowingly transporting tobacco products to a person in Maine unless either the sender or receiver had a Maine license, and requiring tobacco retailers to use a delivery service verifying that the recipient of a tobacco order may legally purchase tobacco. *Id.* at 368-69. The Court held that the Maine law "related to" motor carrier services because, although it did not directly apply to carriers, it could "freeze into place services that carriers might prefer to discontinue in the future." *Id.* at 372. Furthermore, its effect would be to require carriers to offer "services that differ

significantly from those that, in the absence of the regulation, the market might dictate." *Id.* at 371-72. The Court noted that given that "federal law pre-empts state regulation of the details of an air carrier's frequent flyer program," as in *Wolens*, "it must pre-empt" the Maine law. *Id.* at 373.[2]

B. Ginsberg's Class Action Suit Against Petitioners

Respondent Binyomin Ginsberg is a resident of Minnesota and was a Platinum Elite member of petitioner Northwest's WorldPerks frequent flyer program. Northwest revoked Ginsberg's Platinum Elite membership on June 27, 2008. J.A. 35; Pet. App. 3. In January 2009, Ginsberg filed suit against petitioners challenging the revocation of his Platinum Elite membership. *See* J.A. 29-57; Pet. App. 4.[3] According to Ginsberg, he was told by a Northwest representative that his status was revoked because he had "abused" the program. J.A.

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[2] The Court had two other cases addressing the FAAAA last Term. *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013), addressed unique language in the FAAAA that was a "conspicuous alteration" of the ADA's language. *See id.* at 1778 (relying on "with respect to the transportation of property" language in FAAAA). In *American Trucking Ass'n v. City of Los Angeles*, 133 S. Ct. 2096 (2013), the Court reversed the Ninth Circuit and held that FAAAA preemption extended to contractual conditions the city wished to employ as a requirement for trucking companies to use its port. *See id.* at 2103-04.

[3] Petitioners Northwest and Delta merged in October 2008, and Northwest became a wholly-owned subsidiary of Delta. *See* J.A. 32-33. On December 31, 2009, Northwest was merged with and into Delta. *See* p. iv, *supra*.

35; Pet. App. 4. More specifically, Ginsberg attached to his complaint a July 2008 letter he received from Northwest stating that between December 2007 and July 2008 alone, Ginsberg filed 24 complaints with Northwest and "continually asked for compensation over and above [Northwest's] guidelines." J.A. 58-59; Pet. App. 57.

In his complaint, Ginsberg acknowledged that the General Terms and Conditions of the WorldPerks program ("the Agreement") grant Northwest the ability to control the membership of its program, up to and including the removal of members who engage in "abuse" of the program "as determined by Northwest in its sole judgment." As stated in the Agreement and alleged in the complaint:

> Abuse of the WorldPerks program (including failure to follow program policies and procedures, the sale or barter of awards or tickets and any misrepresentation of fact relating thereto or other improper conduct as determined by Northwest in its sole judgment, including, among other things, ... any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees' instructions) may result in cancellation of the member's account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards.

J.A. 39-40, 64-65; Pet. App. 58. Ginsberg alleged that on November 20, 2008, he received an email from a

Northwest representative reiterating the foregoing provision and stating that Northwest was entitled to "enforce the WorldPerks program terms and conditions." J.A. 39-40, 60-62.

Ginsberg's complaint alleged four separate causes of action. In the first count, Ginsberg alleged breach of contract, contending that petitioners revoked his Platinum Elite membership "without valid cause." J.A. 49. In the second count, Ginsberg alleged a breach of the implied covenant of good faith and fair dealing, contending that petitioners did not act "consistent with [Ginsberg's] reasonable expectations" or apply the Agreement "in a reasonable manner" when Northwest revoked his Platinum Elite membership "without valid cause." J.A. 51-52. In the third and fourth counts, Ginsberg alleged negligent and intentional misrepresentation, respectively. J.A. 53-57; *see also* Pet. App. 4, 58-59.

Ginsberg proposed to sue on behalf of himself and other members of WorldPerks whose membership status Northwest allegedly revoked without valid cause. J.A. 46-49. Ginsberg sought damages on behalf of the class in excess of $5 million, as well as injunctive relief requiring Northwest to restore the class members' WorldPerks status and prohibiting Northwest from future revocations of members' WorldPerks status "without valid cause." J.A. 31, 57.

C. The District Court's Decision

The district court granted petitioners' motion to dismiss the complaint. *See* Pet. App. 56-73. Applying *Wolens*, the district court recognized that Ginsberg's

breach of contract claim was not preempted. Pet. App. 69. Nonetheless, the district court concluded that under Minnesota law, Ginsberg had failed to state a claim for relief because he failed to identify any material breach of the WorldPerks Agreement. The court observed that the Agreement "states unambiguously that abuse of WorldPerks, including 'improper conduct as determined by Northwest *in its sole judgment*,' is grounds for 'cancellation of the member's account and future disqualification from program participation.'" Pet. App. 71 (ellipsis omitted). Although Ginsberg had complained that he was not provided an adequate explanation for revocation of his Platinum Elite membership and that "improper conduct" is not sufficiently defined in the Agreement, "Northwest was not required by the agreement to explain its decisions or define what it considers 'improper conduct.'" *Id.*

The court likewise rejected Ginsberg's "bare assertion" that petitioners revoked his Platinum Elite membership "without valid cause." *Id.* The court explained that because the "very issue of what qualifies as 'valid cause'" is "left to the 'sole judgment' of Northwest," Ginsberg was effectively asking the court to "replace Northwest's judgment with his own regarding what counts as 'abuse' of WorldPerks," which would "transgress the unambiguous terms of the agreement by inserting into it external norms." Pet. App. 71-72. Accordingly, the district court dismissed the breach of contract claim, but without prejudice so that Ginsberg could amend his complaint to include allegations of an actual breach of contract. Pet. App. 72.

In what it viewed as a straightforward application of *Wolens*, the district court dismissed Ginsberg's three remaining claims as preempted by the ADA. The court observed that this Court made "abundantly clear" in *Wolens* that "a frequent flier program relates to 'prices' and 'services,' and the WorldPerks program at issue here is none other than a frequent flier program." Pet. App. 69. The court concluded that "[b]ecause Plaintiff's claims for breach of the covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation require the enforcement of state law and relate to both airline prices and services, all are preempted by the ADA." *Id.* In particular, the court observed that Ginsberg's claim for breach of the implied covenant of good faith and fair dealing was preempted under *Wolens* because the covenant "is a requirement of state policy, external to the contract itself, that is given 'the force and effect of law.'" Pet. App. 65.

Ginsberg moved for reconsideration, arguing *inter alia* that his implied covenant claim was not preempted under *Wolens* because "[i]n Minnesota, every contract is subject to an implied covenant known as a covenant of good faith and fair dealing, which is automatically deemed to be part of a contract." Dist. Ct. Doc. No. 17, at 12. The court denied Ginsberg's motion. Pet. App. 41-55. It observed that *Wolens* distinguished "between terms an airline itself stipulates on the one hand, and *any* 'enlargement or enhancement based on state laws or policies external to the agreement,'" like the implied covenant of good faith and fair dealing. Pet. App. 45 (quoting *Wolens*, 513 U.S. at 233). It further noted

that Ginsberg's contention "effectively reduces breach of contract and good faith into the same cause of action." Pet. App. 47. And it reiterated that Ginsberg had failed to state a valid breach of contract claim. *Id.*

D. The Ninth Circuit's Decision

Ginsberg did not appeal the district court's holding that he failed to state a claim for breach of contract. He appealed only the dismissal of his implied covenant of good faith and fair dealing claim on preemption grounds. The Ninth Circuit reversed, holding that such claims are categorically exempted from ADA preemption. *See* Pet. App. 20-40.

Addressing this Court's ADA and FAAAA precedents, the Ninth Circuit dismissed *Morales* as a "narrow" holding that applied only to laws "that actually have a direct effect on rates, routes, or services." Pet. App. 27. It then (mis)cited *Wolens* for the proposition that the ADA does not preempt "breach of contract claims, including those based on common law principles such as good faith and fair dealing," while ignoring *Wolens*'s holding that claims involving frequent flyer programs relate to prices, routes, and services. Pet. App. 30. The Ninth Circuit instead relied heavily on its own decisions. It invoked *West v. Northwest Airlines, Inc.*, 995 F.2d 148, 151 (9th Cir. 1993), to hold that implied covenant of good faith and fair dealing claims are "too tenuously connected to airline regulation to trigger preemption under the ADA," and invoked *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc), for the proposition that the ADA permits state-law claims to proceed so

long as they "do not significantly impact federal deregulation." *See* Pet. App. 32-33. The Ninth Circuit concluded that "[a] claim for breach of the implied covenant of good faith and fair dealing does not interfere with the deregulatory mandate," and "state enforcement of the covenant is not 'to force the Airlines to adopt or change their prices, routes or services—the prerequisite for ADA preemption.'" Pet. App. 34-35 (quoting *Air Transport Ass'n of Am. v. City and Cnty. of San Francisco*, 266 F.3d 1064, 1074 (9th Cir. 2001)).

The Ninth Circuit reasoned that, despite *Wolens* and its frequent flyer program context, Ginsberg's claim did not "relate to" prices or services. The court reviewed the legislative history of the preemption provision and concluded that the history "suggests that Congress intended the preemption language only to apply to state laws directly regulating rates, routes, or services." Pet. App. 37 (internal quotation marks omitted). The Ninth Circuit faulted the district court's focus on the ADA's text, observing that the district court's "broad reading of the statute's language finds no support in the legislative history." *Id.* Citing *Wolens*, the court also believed the link between Ginsberg's claim and petitioners' prices to be "far too tenuous" and, invoking *Charas* for the proposition that "services" is defined narrowly under the ADA, it concluded that Ginsberg's claim "does not relate to 'services' because it has nothing to do with schedules, origins, destinations, cargo, or mail." Pet. App. 38.

Judge Rymer filed a concurring opinion explaining that she believed the panel's holding to be

compelled by the Ninth Circuit's earlier decision in *West*. She added, however, that *West* "seems out of step with the Supreme Court's holding" in *Wolens*. Pet. App. 39.

Northwest filed a petition for rehearing or rehearing en banc. While the petition was pending, Judge Rymer passed away. When the court of appeals eventually ruled on the petition, *see* Pet. App. 1-19, Judge Rymer was replaced on the panel by Judge Schroeder. The court denied the petition, Pet. App. 2, but amended its decision to delete Judge Rymer's concurrence and to delete the final two paragraphs of the main opinion relying on *Charas* to hold that Ginsberg's claim did not "relate to" petitioners' services. *Compare* Pet. App. 19, *with* Pet. App. 37-40.

SUMMARY OF ARGUMENT

This case requires little more than a straightforward application of this Court's pathmarking decision in *Wolens*. As in *Wolens*, there is no need to dwell on whether Ginsberg's implied covenant claim relates to prices, routes, or services. Indeed, this case arises in the exact same frequent flyer context as *Wolens*. That the Ninth Circuit could nonetheless deem Ginsberg's claim to be categorically unrelated to prices, routes, and services is a testament to how far the Ninth Circuit has strayed from this Court's precedents.

As in *Wolens*, the question the Court should dwell upon is whether Ginsberg's implied covenant claim seeks to enforce the parties' "self-imposed undertakings" or seeks to enlarge or expand that bargain by enforcing state law external to the parties'

agreement. Here too, the answer is clear. Ginsberg brought a "routine breach-of-contract claim" that sought to enforce only the parties' self-imposed undertakings, but that claim foundered on the Agreement's "sole judgment" language and was dismissed on the merits. Ginsberg's separate implied covenant of good faith and fair dealing claim is an obvious effort to enlarge the parties' bargain by using state law external to the agreement to limit Northwest's discretion and expand Ginsberg's rights. Indeed, it is hard to imagine a claim that more obviously enlarges the parties' bargain than a claim that an airline breached an "implied" duty of good faith and fair dealing notwithstanding the parties' express agreement that the dispute at issue is left to the airline's "sole judgment." And Minnesota law, which governs Ginsberg's claim, makes clear that the implied covenant of good faith and fair dealing is exactly the kind of extra-contractual, state-law policy that removes a claim from the narrow exception to ADA preemption that *Wolens* recognized for "routine breach-of-contract claims."

The Ninth Circuit's *per se* carve-out of all implied covenant claims from ADA preemption thoroughly frustrates Congress' intent in expressly preempting state-law claims that enlarge the parties' bargains. The law governing implied covenants of good faith and fair dealing is far from uniform and notoriously malleable and thus risks imposing a patchwork of obligations on national and international carriers.

Even more important, precisely because Ginsberg's implied covenant claim seeks to impose obligations based on state law rather than the

parties' voluntary undertakings, it threatens to frustrate the deregulatory intent that was the motivating force behind the ADA. As this Court recognized in *Morales* and *Wolens*, the *raison d'être* for the ADA's express preemption provision is to prevent states from filling the gap created by deregulation at the national level with re-regulation on the state and local level. The Ninth Circuit rule would allow state law to regulate the circumstances in which an airline can exercise its contractual right to terminate a frequent flyer member's participation. Worse still, the decision below opens the door for state re-regulation in an area where the ADA reserved a continuing role for the Department of Transportation (DOT) and where DOT retains the capacity to act when necessary. *Wolens* correctly recognized that DOT has no ability to consider routine breach of contract disputes. But DOT retains the ability to police deceptive and unfair practices and retains the right to intervene in the unlikely event that airlines systematically turn on their most coveted customers.

ARGUMENT

I. The Plain Language Of The ADA And This Court's Precedents Squarely Foreclose Ginsberg's Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing.

The ADA squarely preempts Ginsberg's implied covenant claim. That claim arises in precisely the same context as *Wolens* and is plainly "related to" petitioners' prices, routes, or services. And by alleging a breach of the implied covenant of good

faith and fair dealing, rather than of the express terms of the Agreement, Ginsberg patently seeks to enforce state policies external to the Agreement. His claim is thus preempted under the plain terms of the ADA's express preemption provision.

A. Ginsberg's Challenge to Northwest's Administration of Its Frequent Flyer Program Is "Related To" Petitioners' Prices, Routes, and Services.

This Court has repeatedly recognized the expansive sweep of the "related to" language in the ADA's preemption provision. Those words are "deliberately expansive," "conspicuous for [their] breadth," and "express a broad pre-emptive purpose." *Morales*, 504 U.S. at 383-84 (internal quotation marks omitted). Thus a claim need only have "a connection with or reference to airline" prices, routes, or services to be preempted under the ADA. *Id.* at 384. Preemption is warranted even if the effect on prices, routes, or services "is only indirect," *id.* at 386 (internal quotation marks omitted), and it is immaterial whether state law is "'consistent' or 'inconsistent' with federal regulation," *Rowe*, 552 U.S. at 370, or is essential or unessential to airline operations, *Wolens*, 513 U.S. at 226. For good reason, then, the Court in *Wolens* viewed claims arising from a frequent flyer program to be so obviously related to both an airline's prices and services that it "need not dwell on the question." *Id.*

The Court need dwell no longer here. Ginsberg's claim directly challenges Northwest's administration of its frequent flyer program, including Northwest's ability to control the membership of that program

and the benefits it chooses to provide to members in the form of free flights, flight upgrades, mileage multipliers, and other rewards. Ginsberg seeks reinstatement of his program membership status and renewed access to the reduced prices and enhanced services that come from his membership status as well as compensation for the loss of those benefits. His claim is thus clearly "related to" both prices, including Northwest's "charges in the form of mileage credits for free tickets and upgrades," and services, including "access to flights and class-of-service upgrades." *Wolens*, 513 U.S. at 226. Indeed, "access to flights and class-of-service upgrades" are precisely what Ginsberg alleges he was deprived of as a result of Northwest's revoking his Platinum Elite membership. *See* J.A. 49 (complaint alleging deprivation of "valuable Program benefits ... including, but not limited to, flight upgrades, accumulated mileage, [and] benefits on other airlines").

Like many airlines, moreover, Northwest's frequent flyer program is an important means for attracting and retaining high-margin customers and repeat business. That, in turn, affects the prices Northwest ultimately charges and the services it offers to all its customers. *See, e.g.*, Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems* 31-35 (Feb. 1990) (describing frequent flyer programs and their relationship to airfares). In short, as in *Wolens*, Ginsberg's claim undeniably has "a connection with or reference to airline" prices, routes, or services, which is all that is

needed to satisfy this condition for ADA preemption. *Cf. Rowe*, 552 U.S. at 373 (stating that "federal law pre-empts state regulation of the details of an air carrier's frequent flyer program").

The Ninth Circuit's conclusion that Ginsberg's claim is *not* "related to" petitioners' services or rates is nothing short of mystifying. The court did not acknowledge the repeated references in *Morales* to the broad sweep of the ADA's preemption provision; in fact, it did not mention *Morales* at all when addressing this issue. Even more remarkably, it failed to acknowledge that *Wolens* found claims arising from a frequent flyer program to be "related to" both prices and services. And it did not even attempt to construe or apply the plain text of the provision's "related to" language. Instead, the court invoked the ADA's legislative history to conclude that "Congress intended the preemption language only to apply to state laws directly regulating rates, routes, or services." Pet. App. 37 (internal quotation marks omitted). But that distinction between direct regulation and indirect effect is exactly what the Morales *dissent* advocated, *see* 504 U.S. at 425-26 (Stevens, J., dissenting), and what the majority rejected in no uncertain terms. *See* 504 U.S. at 385 ("Had the statute been designed to preempt state law in such a limited fashion, it would have forbidden the States to 'regulate rates, routes, and services.'"); *id.* at 386 (observing that state law may satisfy the "related to" requirement even if "the effect is only indirect"). The Ninth Circuit's conclusion that Ginsberg's claim is categorically unrelated to prices, routes, or services thus only serves to underscore how

far the Ninth Circuit has deviated from this Court's precedents.

B. Ginsberg's Claim Seeks to Enlarge the Parties' Voluntary Agreement By Enforcing State Policies External to the Agreement, and Thus Falls Outside the *Wolens* Exception for Routine Breach-of-Contract Claims.

This Court in *Wolens* recognized that the fact that a claim relates to prices, routes, or services is not enough to render it preempted. The plain text of the ADA's express preemption provision also requires the state to "enforce" a state law or policy relating to prices, routes, or services. This is the requirement on which the Court in *Wolens* did "dwell," and which gave rise to the distinction between the preempted fraud claims and the routine breach-of-contract claims which were allowed to proceed. Both sets of claims related to prices, routes, or services, but only the fraud claims sought to enforce state law external to the parties' agreement. The "routine breach-of-contract claims" were allowed to proceed because they did not seek to enforce state law, but instead only the parties' "self-imposed undertakings," *i.e.*, that "an airline dishonored a term the airline itself stipulated." 513 U.S. at 232-33.

The very logic of *Wolens* necessitates a distinction between "routine breach-of-contract claims" and claims, whether they sound in tort, contract, or some netherworld between the two, that depend on state law or state policies external to the agreement to enlarge or expand the parties' bargain. *Id.*; *see also Brown v. United Airlines, Inc.*, ___ F.3d

___, 2013 WL 3388904, at *10 (1st Cir. 2013) (finding unjust enrichment claims preempted while recognizing the doctrine "exists in the hazy realm of quasi-contract and restitution"). The latter clearly involve the enforcement of state law and are thus preempted.

The plaintiffs in *Wolens* assailed American Airlines' changes to its frequent flyer program retroactively imposing blackout dates and caps on available seats. They contended that these retroactive changes constituted fraud and violated the express terms and conditions of the program's membership agreement, thus constituting a breach of contract. While the fraud claims involved the enforcement of state law and were thus preempted, the Court held that the contract claim was not preempted because it sought recovery "solely for the airline's alleged breach of its own, self-imposed undertakings." 513 U.S. at 228. Adjudication of such "routine breach-of-contract claims" did not involve the enforcement of state law within the meaning of the ADA because the "terms and conditions airlines offer and passengers accept are privately ordered obligations," and a "remedy confined to a contract's terms simply holds parties to their agreement." *Id.* at 229.

The Court explained that because the ADA is designed to "stop[] States from imposing their own substantive standards" related to airlines' prices, routes or services, claims that seek an "enlargement or enhancement" of the parties' bargain by enforcing "state laws or policies external to the agreement" are preempted. *Id.* at 232-33. Thus claims that

implicate "binding standards of conduct that operate irrespective of any private agreement," "official, government-imposed policies, not the terms of a private contract," or a State's "own public policies" may not proceed. *Id.* at 229 n.5.

Wolens clearly mandates preemption here. As the district court correctly recognized, Ginsberg's claim for breach of the implied covenant of good faith and fair dealing—as opposed to his separate "routine breach-of-contract" action that failed on the merits—does not fall within the *Wolens* exception because the whole point of the claim is to override the express contractual terms that put control over program membership in Northwest's "sole judgment" and doomed Ginsberg's contract claim on the merits. Ginsberg's claim for breach of the implied covenant does not allege that Northwest "dishonored a term the airline itself stipulated." *Id.* at 232-33. Nor does it allege a breach of the "terms and conditions [Northwest] offer[ed] and [Ginsberg] accept[ed]" or seek a "remedy confined to [the Agreement's] terms." *Id.* at 228-29. Rather, it quite plainly seeks an "enlargement or enhancement" of the Agreement between Ginsberg and Northwest *beyond* those terms, based on "state laws or policies external to the agreement," *id.* at 233—namely, the implied covenant of good faith and fair dealing.

There is nothing subtle or difficult about this. The very name of the cause of action—an *implied* covenant of good faith and fair dealing—makes clear that state law is supplementing the express terms of the parties' self-imposed undertakings. *See* Monique C. Lillard, *Fifty Jurisdictions in Search of a*

Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context, 57 Mo. L. Rev. 1233, 1240 (1992) ("[B]y implying 'in law' a covenant of good faith and fair dealing, the courts are ... imposing contractual terms to which the parties did not actually consent"). And the very fact that Ginsberg's separate contract claim (count 1) fails on the merits underscores that the implied covenant claim (count 2) adds something to the parties' agreement, and it does so via the enforcement of "state laws or policies external to the agreement," *Wolens*, 513 U.S. at 233.

As the district court aptly put it, Ginsberg's implied duty of good faith claim "does not appear *ex nihilo*"; rather, "it is implied by state law." Pet. App. 64-65. Ginsberg's implied covenant claim does not dispute that the terms of the WorldPerks program vest questions of membership eligibility based on program abuse in Northwest's "sole judgment." Instead, Ginsberg argues that state law overrides that contractual provision and limits Northwest's exercise of that judgment, and he seeks a class-wide injunction prohibiting Northwest from relying on that contractual provision. What Ginsberg's claim seeks—indeed, what it *requires*—is not enforcement of the parties' voluntary undertakings, but "state enforcement of the covenant." Pet. App. 35. The Ninth Circuit acknowledged as much *in haec verba* but failed to comprehend the implications for that conclusion under *Wolens*. Since Ginsberg's claims all relate to prices, routes, or services, a claim that involves "state enforcement of the covenant" as opposed to the parties' self-imposed undertakings is preempted.

Indeed, Minnesota law, which indisputably governs Ginsberg's state-law claims, underscores this conclusion. In construing and applying the implied covenant of good faith and fair dealing, Minnesota, like some, but not all, states, looks to Section 205 of the Restatement (Second) of Contracts. *See, e.g., In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995). Section 205 defines "[g]ood faith performance or enforcement of a contract" as that which "excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Restatement (Second) of Contracts § 205 cmt. a (1981); *see also* Farnsworth on Contracts § 7.17 (3d ed. 2004) (describing the duty of good faith and fair dealing as "based on fundamental notions of fairness"); *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312-13 (2010) (describing the implied covenant of good faith and fair dealing as a "fairness requirement" permitting parties to obtain relief "inconsistent with the express terms" of an agreement (brackets and internal quotation marks omitted)).

Were Ginsberg's claim to proceed, therefore, its merit would be determined in accordance not with the "privately ordered obligations" into which Ginsberg and Northwest entered, *Wolens*, 513 U.S. at 228-29, but with shapeless "community standards" of "decency, fairness or reasonableness" imposed by "state laws or policies external to the agreement." Such claims are squarely preempted under the text of the ADA and the logic of *Wolens*. They involve the enforcement of state policy and community standards, not self-imposed undertakings. *See Buck*

v. American Airlines, Inc., 476 F.3d 29, 35 (1st Cir. 2007) (preempting claim for breach of the implied covenant of good faith and fair dealing under ADA because plaintiffs sought "to further a state policy"); *Harper v. Healthsource New Hampshire, Inc.*, 674 A.2d 962, 965 (N.H. 1996) ("The implied covenant of good faith and fair dealing is an example of a common law application of public policy to contract law.").

In this respect, Ginsberg's claim invoking the implied covenant to escape the express terms of a contract is little different from a claim invoking the doctrine of unconscionability to accomplish the same result. Although part of contract law, the unconscionability doctrine constitutes a "state law[] or polic[y] external to the agreement" and is a "binding standard[] of conduct that operate[s] irrespective of any private agreement." *Wolens*, 513 U.S. at 229 n.5, 233.

Indeed, in *Wolens*, the Solicitor General explicitly argued that unconscionability was one of "those aspects of [a State's] common law of contracts ... that go beyond ascertaining and enforcing the private agreement between the parties," thereby warranting preemption. Br. for the United States 9-10, *Wolens*, No. 93-1286 (U.S. June 2, 1994); *see also id.* at 28 (noting that principles of unconscionability "seek to effectuate the State's public policies, rather than the intent of the parties"). This Court expressly embraced the position of the Solicitor General in *Wolens*, *see, e.g.*, 513 U.S. at 226, and its reference to state policies external to the agreement fits the unconscionability doctrine to a tee. Not surprisingly,

lower courts have rejected efforts to invoke the unconscionability doctrine as inconsistent with the ADA and *Wolens*. *See, e.g., Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 854 & n.3 (8th Cir. 2009) (preempting breach-of-contract claim under ADA to the extent plaintiff alleged that a contractually established fee "is too unconscionably high"); *ICU Investigations, Inc. v. Simonik Moving & Storage, Inc.*, 2009 WL 2475225, at *9 (N.J. Super. Ct. App. Div. Aug. 14, 2009); *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901, 902 (Wash. Ct. App. 2000); *cf. Leonard v. Nw. Airlines, Inc.*, 605 N.W.2d 425, 431 (Minn. Ct. App. 2000) (preempting claim relying on equitable doctrine against contract penalties that "has as its foundation the unconscionability doctrine").

The "community standards" criterion articulated by Section 205 of the Restatement evokes the same public policy concerns underlying unconscionability claims. In fact, the commentator whose work substantially influenced Section 205 of the Restatement has described that section as "of a piece with explicit requirements of 'contractual morality' *such as the unconscionability doctrine* and various general equitable principles." Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810, 811 (1982) (emphasis added); *see also* Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 Iowa L. Rev. 497, 499 (1984) (observing that the "*Restatement*-Summers formulation ... implies a ground for judicial decision that lies outside of and may take precedence over the agreement of the parties"). And there is no doubt

about the source of those notions of "contractual morality." They come from state law, and involve the enforcement of state "policy external to the agreement."[4]

Finally, allowing implied covenant claims to proceed effectively sanctions avoidance of this Court's ADA precedents. A plaintiff whose claim is squarely foreclosed under a contract can simply re-label it as a claim for breach of an implied covenant of good faith and fair dealing. The end run around *Wolens* is dramatically illustrated in this case by Ginsberg's decision to drop his contract claim (which was effectively foreclosed by the contract's "sole judgment" language) and pursue the "implied covenant" theory to obtain what the express terms of the contract plainly did not provide. To permit such claims to go forward robs the airline industry of much of the protection conferred by Congress in the ADA, and it can hardly be what this Court had in mind when it decided *Wolens*.

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[4] Repeatedly conflating claims for breach of the implied covenant with "routine breach-of-contract claims," *see* Pet. App. 21, 23, 30, the Ninth Circuit dismissed petitioners' argument that Ginsberg's claim sought to enlarge the parties' bargain because "the Supreme Court rejected this argument in *Wolens*," Pet. App. 34. But *Wolens* used the limiting modifier "routine" with good reason. The Court recognized that some claims that sound in contract nonetheless invoke state policy external to the agreement. Such claims are non-routine in the sense relevant for ADA preemption; they do something more than enforce the parties' self-imposed undertakings and instead enforce state policy external to the agreement.

II. Preemption Of Claims For Breach Of The Implied Covenant Of Good Faith And Fair Dealing Is Consistent With The Policies Underlying The ADA.

The plain text of the ADA's express preemption provision and the logic of this Court's decision in *Wolens* clearly compel preemption of Ginsberg's implied covenant claim. That is enough to resolve this case. Nonetheless, it bears emphasis that the Ninth Circuit's contrary rule is fundamentally antithetical to Congress' intent in enacting the ADA.

A. The Open-Ended and Amorphous Nature of the Implied Covenant of Good Faith and Fair Dealing Would Produce Patchwork Regulation.

The ADA is designed to avoid a "state regulatory patchwork" inconsistent with Congress' desire to leave matters concerning airlines either to federal regulators or to the competitive marketplace. *Rowe*, 552 U.S. at 373. In *Wolens*, the Court rejected concerns that permitting "routine breach-of-contract claims" to proceed might result in nonuniform regulation of airlines. "Because contract law is not *at its core* 'diverse, nonuniform, and confusing,'" the Court observed, there was "no large risk of nonuniform adjudication inherent in state-court enforcement of the terms of a uniform agreement." 513 U.S. at 233 n.8 (emphasis added; quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992) (plurality opinion), and Br. for United States 27, *Wolens*).

But while contract law is uniform enough at its core, *i.e.*, when it comes to enforcing the express

terms of voluntary contracts, the precise opposite is true with respect to the implied covenant. Courts and commentators do not agree even on which standards to apply when adjudicating claims alleging a breach of the implied covenant. And the amorphous and open-ended standards that characterize implied covenant claims make a patchwork of regulation all but inevitable. Even if two states agree that there is an implied covenant to apply community standards of decency, the nature of those community standards in the two states may vary substantially. Indeed, this Court has recognized the inevitable variance among jurisdictions when it comes to community standards of decency in other contexts. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 32-33 (1973). Accordingly, the Ninth Circuit's approach "could easily lead to"—indeed, all but guarantees—the "state regulatory patchwork" Congress specifically intended to prevent. *Rowe*, 552 U.S. at 373.

The law governing implied covenant claims is far from uniform and is permeated with vague standards that can be interpreted differently from case to case even within a single jurisdiction. "From the beginning, the good faith criterion has been criticized for being so difficult to define that it is unhelpful as a legal standard." Lillard, *supra*, at 1236. The doctrine of good faith and fair dealing has "been defined variously as requiring reasonableness or fair conduct, reasonable standards of fair dealing, decency as well as fairness and reasonableness, fairness, and community standards of fairness, decency and reasonableness." Nicola W. Palmieri, *Good Faith Disclosures Required During*

Precontractual Negotiations, 24 Seton Hall L. Rev. 70, 79 (1993) (footnotes omitted). Indeed, commentators have identified no fewer than eight different approaches that "have been proposed by commentators and adopted by the courts" for "determining whether conduct violates the covenant." Thomas A. Diamond & Howard Foss, *Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 Hastings L. J. 585, 590 (1996). As Justice Souter aptly summarized matters in his days as a common law jurist, "the commentators despair of articulating any single concept of contractual good faith." *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 191 (N.H. 1989) (Souter, J.).

Even proponents of the doctrine were candid about its malleability and variability. As one of the doctrine's earliest proponents wryly observed, the "varieties of good faith are not quite as infinite as those of religious faith." E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 668 (1963).

Critics of the doctrine have been even more pointed. Because "[e]fforts to devise workable standards or relevant criteria for determining when the covenant has been violated have been unavailing," the result is "a doctrine whose application has been ad hoc, yielding inconsistent results and depriving parties of the ability to predict what conduct will violate the covenant." Diamond & Foss, *supra*, at 585-86. Given the "ability of the

implied obligation of good faith to confound and confuse contract law," application of the covenant has become "a confusing and unsatisfying business." Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 St. John's L. Rev. 559, 587, 612 (2006); *see also* Seth William Goren, *Looking For Law in All the Wrong Places: Problems in Applying the Implied Covenant of Good Faith Performance*, 37 U.S.F. L. Rev. 257, 258 (2003) (noting "considerable confusion as to the nature of the covenant of good faith, when the covenant is implicated, and how claims arising from a breach of the covenant are enforced").

Despite differences in the formulation of the doctrine, courts charged with construing and applying the implied covenant, however defined, agree on one thing: the doctrine is remarkably vague and open-ended. For example, the Minnesota Supreme Court has described the covenant as inviting "judicial incursions into the amorphous concept of bad faith." *Hunt v. IBM Mid America Employees Fed. Credit Union*, 384 N.W.2d 853, 858 (Minn. 1986) (quoting *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 629 (Hawaii 1982)); *accord Ross v. Times Mirror, Inc.*, 665 A.2d 580, 586 (Vt. 1995); *Hinson v. Cameron*, 742 P.2d 549, 554 (Okla. 1987); *Hillesland v. Fed. Land Bank Ass'n of Grand Forks*, 407 N.W.2d 206, 214 (N.D. 1987).

Because "[g]ood faith is a concept that defies precise definition," *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates*, 864 A.2d 387, 395 (N.J. 2005), the implied covenant of good

faith and fair dealing "nebulously hovers over the contracting parties," *Lake Martin/Alabama Power Licensee Ass'n, Inc. v. Alabama Power Co., Inc.*, 601 So. 2d 942, 945 (Ala. 1992); *see also State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Comm'rs*, 937 N.E.2d 1274, 1276 (Ohio 2010) (characterizing good faith as "a general and somewhat indefinite term" with "no constricted meaning" (internal quotation marks omitted)); *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) ("[T]he term 'good faith' has no set meaning, serving only to exclude a wide range of heterogeneous forms of bad faith." (quotation marks omitted)); *Pierola v. Moschonas*, 687 A.2d 942, 950 (D.C. 1997) (referring to "vague and subjective notions of good faith"). The federal courts of appeals are in agreement. *See, e.g., Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 92 (3d Cir. 2000) ("The covenant of good faith ... is vague and amorphous."); *Kansas City Power & Light Co. v. Ford Motor Credit Co.*, 995 F.2d 1422, 1430 (8th Cir. 1993) ("'Good faith' is an amorphous concept, capable of many forms yet requiring none."); *In re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1988) (deeming good faith "an amorphous notion").

The broad, shapeless nature of the implied covenant of good faith and fair dealing all but guarantees a patchwork of inconsistent results. For example, consistent with the general principle that "there can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract," Williston on Contracts § 63:22 (4th ed.), many states reject out of

hand implied covenant claims where, as here, the alleged good faith obligations are inconsistent with contractual terms that expressly give one party sole discretion to take particular actions. *See, e.g.*, *Steiner v. Thexton*, 226 P.3d 359, 365 (Cal. 2010); *Shoney's LLC v. MAC East, LLC*, 27 So.3d 1216, 1223 (Ala. 2009); *Hobin v. Coldwell Banker Residential Affiliates, Inc.*, 744 A.2d 1134, 1137-39 (N.H. 2000); *Cont'l Potash, Inc. v. Freeport-McMoran, Inc.*, 858 P.2d 66, 82 (1993); *Automatic Sprinkler Corp. of Am. v. Anderson*, 257 S.E.2d 283, 284 (Ga. 1979). Other states, however, have held that even if a contract provides a party with sole discretion to take particular actions, the party must exercise that discretion consistent with the obligations of "good faith and fair dealing." *See, e.g.*, *Smith v. Grand Canyon Expeditions Co.*, 84 P.3d 1154, 1159 (Utah 2003); *Wilson v. Amerada Hess Corp.*, 773 A.2d 1121, 1129-30 (N.J. 2001); *Dalton v. Educ. Testing Serv.*, 663 N.E.2d 289, 291 (N.Y. 1995).

The potential for differing outcomes arising from claims for breach of the implied covenant is well illustrated by state courts' experience with implied covenant claims in the at-will employment context. The common-law rule of at-will employment provides that any hiring is presumed to be "at will," granting an employer complete discretion to discharge an employee without any cause. *See* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 Harv. L. Rev. 1816, 1816 (1980). Most states, including Minnesota, have rejected claims that the implied covenant of good faith and fair dealing cabins employers' discretion to discharge at-will employees.

See, e.g., *Hunt*, *supra*; *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 220 (Iowa 1996); *Breen v. Dakota Gear & Joint Co., Inc.*, 433 N.W.2d 221, 224 (S.D. 1988); *Morriss v. Coleman Co., Inc.*, 738 P.2d 841, 851 (Kan. 1987); *Hillesland v. Fed. Land Bank Ass'n of Grand Forks*, 407 N.W.2d 206, 214 (N.D. 1987); *Cockels v. Int'l Bus. Expositions, Inc.*, 406 N.W.2d 465, 468 (Mich. App. 1987); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1086 (Wash. 1984); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 838 (Wisc. 1983); *Murphy v. Am. Home Products Corp.*, 448 N.E.2d 86, 91 (N.Y. 1983); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 629 (Hawaii 1982).

Several states, however, have applied the covenant to restrict the complete discretion afforded to employers under the at-will rule. *See, e.g.*, *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 101 (Del. 1992); *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744 (Idaho 1989); *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063 (Mont. 1982); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), *modified by Howard v. Dorr Woolen Co.*, 414 A.2d 1273 (N.H. 1980). The precise limits imposed by the implied covenant vary among those jurisdictions. *See* James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law*, 32 Comp. Lab. L. & Pol'y J. 773, 779-85 (2011) (describing the "distinct conceptual approaches" taken by states applying the covenant to at-will employment).

That the states have reached diverging answers to the at-will question is instructive for two reasons.

First, it constitutes a concrete example of the covenant's amorphous, open-ended nature: applying the covenant to the same straightforward question of law, different jurisdictions have reached dramatically different results. Second, the at-will employment context is analogous to the circumstances in this case. Just as the at-will rule gives complete discretion to employers to discharge employees, the Agreement allows Northwest to terminate abusive members "in its sole judgment." As in the at-will employment context, permitting plaintiffs like Ginsberg to bring claims invoking the implied covenant to override contractual grants of discretion invites a patchwork of varying results. The inevitable result would be the uncertainty, inconsistency, and "state regulatory patchwork"—not to mention inevitable forum shopping—that Congress intended to avoid in enacting the ADA. *Rowe*, 552 U.S. at 373.

B. Claims for Breach of the Implied Covenant Create a Significant Risk of State Interference With Competition and Commercial Activity in the Airline and Transportation Industries.

Even if implied covenant law were more uniform or more susceptible to consistent application, the Ninth Circuit's approach still would run afoul of the ADA's clear deregulatory intent. Congress enacted the ADA to further "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive market forces." 49 U.S.C. § 40101(a)(6), (12)(A). The express preemption provision directly serves those goals by "ensur[ing]

that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378. But implied covenant claims ask a court to substitute state law for competitive market forces, contrary to Congress' deregulatory intent. Worse still, this case arises in one of the discrete contexts in which DOT retains substantial regulatory authority and capacity. If DOT determines that airlines are being deceptive or manipulative in exercising their discretion to remove abusive members of their frequent flyer programs (an unlikely prospect since the programs exist to reward and retain the most valued customers), DOT has authority to act. Absent such a determination, there is no role for courts applying state law concepts of fundamental fairness and decency.

As this Court implicitly recognized in *Wolens*, frequent flyer programs are an integral component of airline competition. Indeed, they "were introduced soon after the advent of deregulation." Abhijit Banerjee & Lawrence H. Summers, *On Frequent Flyer Programs and Other Loyalty-Inducing Economic Arrangements* 22, Harvard Institute of Economic Research (Sept. 1987), *available at* http://econ-www.mit.edu/files/501. "[O]ne of the most effective marketing practices yet devised for differentiating airline services," frequent flyer programs "open up new avenues for competition" and "make a positive contribution to airline productivity and efficiency." *Airline Marketing Practices*, *supra*, at 31, 39, 41. Airlines "without a frequent flyer base are at a competitive disadvantage." Banerjee & Summers, *supra*, at 23.

To ensure that their programs are cost-effective and economically sustainable, airlines must "maintain strict control over the disposition of frequent flyer awards," *Airline Market Practices*, *supra*, at 32, which in turn requires a corresponding level of control over the program's membership—both overall and at specific reward levels. Like many carriers, Northwest has chosen to ensure that necessary level of control by expressly providing that it may remove members for abuse of the program "in its sole judgment." There is nothing deceptive about this express contractual retention of discretion—it is explicitly spelled out in the Agreement.

Nor are these reservations of discretion likely to be frequent sources of customer complaint. The *raison d'être* of frequent flyer programs is to reward an airline's most valued and valuable customers. *See id.* at 31 ("Frequent flyer programs are directed toward the most lucrative segment of airline traffic—the full-fare business traveler."); Paul Stephen Dempsey, *The Financial Performance of the Airline Industry Post-Deregulation*, 45 Hous. L. Rev. 421, 453 (2008) (noting that frequent flyer programs are intended to "induce consumer loyalty among high-yield business traffic"). Airlines go to substantial efforts to build up their frequent flyer memberships. *See, e.g.*, *Airline Marketing Practices*, *supra*, at 32-33, 40 (describing airline partnerships with hotel, car rental, and credit-card companies, partnerships with foreign airlines, and "custom-tailored promotional bonuses" to attract and retain members). They will not lightly take action to reduce their memberships.

Nonetheless, if despite the clear contractual language and unlikelihood of recurring customer complaints, DOT identified problematic practices, it would not lack authority to act. While Congress largely deregulated the airline industry in the ADA, DOT retains the authority to investigate and determine whether an airline "has been or is engaged in an *unfair* or deceptive practice," including any related to frequent flyer programs. 49 U.S.C. § 41712(a) (emphasis added); *see also* FAA Modernization and Reform Act of 2012, § 408, Pub. L. 112-95, 126 Stat. 11 (providing that the Secretary of Transportation "may investigate consumer complaints regarding ... the rights of passengers who hold frequent flyer miles or equivalent redeemable awards earned through customer-loyalty programs"). Thus, there is no need to unleash courts and juries nationwide to apply their own varying notions of fairness, when the expert regulatory agency retains the authority to police unfair practices.

Not only does DOT have the authority to investigate unfair practices concerning frequent flyer programs, it "has relied on [this] authority ... to prevent unfair and deceptive practices involving such programs." Br. for the United States 4, *Wolens*; *see also, e.g.*, U.S. Department of Transportation, Office of Aviation Enforcement and Proceedings, Air Travel Consumer Report 38 (June 2013) (listing 16 frequent-flyer-related complaints received for the month of April 2013). Indeed, DOT itself has expressed the view that claims like Ginsberg's are preempted. In 1992, DOT issued an order declining to issue regulations governing frequent flyer programs. *See* Order Dismissing Complaint and Denying Petition

for Rulemaking, 1992 WL 133179 (May 29, 1992). The applicants for the order had argued, among other things, that agency regulations were necessary because "various state and federal courts may in effect regulate the programs through their adjudication of individual contract suits," leading to regulatory disuniformity. *Id.* at *9. DOT found this concern unavailing because, in its view, "state contract laws of general applicability cannot authorize a determination of whether individual terms and conditions of a carrier's program are fair and reasonable, to the extent they relate to an airline's rates, routes and services." *Id.* The reason for this, DOT continued, is that "*[s]uch state regulation is preempted*" by the ADA. *Id.* (emphasis added).[5]

Contrary to the Ninth Circuit's suggestion, therefore, it is not the case that if Ginsberg's implied covenant claim were preempted, he "literally would have no recourse." Pet. App. 31; *see also* Resp. C.A. Br. 19 (contending that absent a claim for breach of the implied covenant, "the Airlines are free to lie, cheat and steal"). Most obviously, Ginsberg had the ability to enforce the actual terms of his contract, and to the extent his concern is that those terms are simply too unfair, he can lodge a complaint with

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[5] DOT's own "Fact Sheet" on frequent flyer programs informs consumers that "[e]ach airline's program carries certain conditions and limitations," and consumers "should read carefully the promotional material and 'fine print' booklet that the airline should give you when you become a member." U.S. Department of Transportation, Frequent Flier Programs: How to Make the Right Decision, http://www.dot.gov/airconsumer/frequent-flier-programs (July 23, 2013).

DOT, which retains authority to police unfair practices.

DOT's authority and capacity to police unfair practices stands in stark contrast to its capacity to address "routine breach-of-contract" claims. In *Wolens*, the Court credited the Solicitor General's representation that DOT "has neither the authority nor the apparatus required to superintend a contract dispute resolution regime." 513 U.S. at 232 (citing Br. for the United States 22). Thus, if a frequent flyer member wants to enforce the terms of the contract, the remedy lies in court. But when the complaint is that the contract as written is unfair and the member invokes a "fairness requirement" in an effort to obtain relief "inconsistent with the express terms" of the contract, *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312-13 (2010), a different result obtains. Such an invocation of state policy external to the agreement is manifestly an effort to enforce state law, clearly relates to prices and services, and is just as clearly preempted under the ADA and *Wolens*. DOT remains available to police such alleged unfairness, but can do so employing notice and comment and uniform nationwide rules. The alternative envisioned by the Ninth Circuit has nothing to recommend it, and is in all events fundamentally inconsistent with the text of the ADA and the teachings of this Court's precedents.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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July 24, 2013

Statutory Appendix

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Airline Deregulation Act

49 U.S.C. § 41713

Preemption of authority over prices, routes, and service

(a) Definition.— In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.—

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.—

(A) General rule.— Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.— Subparagraph (A)—

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1)—This paragraph shall not limit the applicability of paragraph (1).

RESPONDENT'S BRIEF

No. 12-462

IN THE
Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., and DELTA AIR LINES, INC., a Delaware corporation,
Petitioners,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief for Respondent

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September 2013

QUESTION PRESENTED

Rabbi S. Binyomin Ginsberg is a long-standing Northwest customer who, in 2005, earned the highest level of membership benefits in Northwest's "WorldPerks" frequent flyer program. In 2008, Northwest abruptly revoked his Platinum Elite membership, depriving him of benefits under the program, including miles he had already accrued. Ginsberg filed suit alleging, as relevant here, that Northwest breached the contractual obligation of good faith and fair dealing when it terminated his elite membership in the program. The question presented is:

Did the court of appeals correctly hold that Ginsberg's contract claim based on the covenant of good faith and fair dealing is not preempted by the Airline Deregulation Act's preemption provision, 49 U.S.C. § 41713(b)(1), which provides that States "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation"?

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INTRODUCTION

In *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222, 228 (1995), this Court held that although the Airline Deregulation Act (ADA) "bars state-imposed regulation of air carriers," it does not preempt claims "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." In this case, Rabbi S. Binyomin Ginsberg seeks recovery for Northwest's breach of the contractual obligation of good faith and fair dealing in its frequent flyer program contract, which it breached when it terminated his elite membership in the program.

Like the contract claim in *Wolens*, Ginsberg's claim is not preempted by the ADA. As in *Wolens*, Ginsberg's claim is a routine breach-of-contract claim that seeks to enforce the parties' self-imposed, contractual undertakings. It has long been recognized that the express terms of a contract do not always capture the full scope of the parties' agreement, and that contracts include both their express and implied terms. *See, e.g., Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (Cardozo, J.) ("[T]he whole writing may be instinct with an obligation, imperfectly expressed.") (internal quotation marks and citation omitted). The requirement that contracts be performed in good faith is a means of enforcing the implied terms in agreements into which parties have voluntarily entered.

The existence of implied terms in the WorldPerks contract is underscored by the contract's provision allowing Northwest to terminate membership for "improper conduct as determined . . . in its sole judgment." JA 64. If that provision were interpreted to allow Northwest to terminate membership for any reason whatsoever, Northwest would have discretion to deprive

Ginsberg of all benefits of the bargain into which the parties entered. In such a case, the parties' intent to be bound by a non-illusory, enforceable contract demonstrates that there are good faith limits on the discretionary term. Ginsberg's claim seeks to enforce those limits and, under *Wolens*, is not preempted.

Ginsberg's claim also is not preempted for two additional reasons. First, whether or not they arise from a contract, common-law claims do not involve "a law, regulation, or other provision" as required for preemption by the ADA. 49 U.S.C. § 41713(b)(1). Second, the ADA only preempts claims that are "related to" air carrier prices, routes, or services. *Id.* Ginsberg's claim relates to membership status in a frequent flyer program, not to flights or their prices. Although frequent flyer credits can be earned by flying or exchanged for airfare, they can also be earned and spent in many other ways, such as by credit card purchases and on Broadway shows.

STATEMENT OF THE CASE

A. Statutory Background

Until 1978, the Civil Aeronautics Board (CAB) had extensive authority to regulate interstate air travel. If an airline wanted to change the cities it served or the prices it charged, it had to seek permission from the CAB. The CAB could deny applications for new routes or refuse to allow new entrants to the industry. And even when it approved a proposal, its administrative processes could lead to extensive delays. *See* H.R. Rep. No. 95-1211, 95th Cong., 2d Sess. 2-3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737, 3737-38.

In 1978, concluding that "maximum reliance on competitive market forces" would lower prices and

improve services, Congress enacted the ADA, Pub. L. No. 95-504, 92 Stat. 1705, which largely deregulated the airline industry. "To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a preemption provision[.]" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). As currently codified, that provision provides that states "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1).

This Court has twice interpreted the ADA's preemption provision. First, in *Morales*, 504 U.S. 374, the Court considered whether the ADA prohibited states from using their consumer protection statutes to enforce National Association of Attorneys General guidelines governing airline advertising. Focusing on the term "relat[ed] to," the Court explained that a state law could "relate to" airline rates, routes, or services even if it did not directly regulate them. *Id.* at 384-86. The Court held that the guidelines related to airline rates because "every one of the guidelines . . . bears a 'reference to' airfares," because they collectively established "binding requirements as to how tickets may be marketed if they are to be sold at given prices," and because "beyond the guidelines' express references to fares, it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares." *Id.* at 388. At the same time, the Court noted that "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id.* at 390 (citation omitted).

Second, in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, the Court considered whether the ADA preempted

state consumer-fraud-act and breach-of-contract claims challenging American Airlines' devaluation of frequent flyer program credits through the imposition of blackout dates and limits on available seats. The Court found that the claims related to "'rates,' *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates." *Id.* at 226. However, the Court went on to explain that the ADA's preemption provision "contains other words in need of interpretation, specifically, the words 'enact or enforce any law.'" *Id.* at 226 (citation omitted). The Court held that although the consumer-fraud-act claims involved the enactment or enforcement of a law, the breach-of-contract claims did not: "We do not read the ADA's preemption provision to shelter airline from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings," it explained. *Id.* at 228. "States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier," but "terms and conditions airlines offer and passengers accept are privately ordered obligations 'and thus do not amount to a State's 'enact[ment] or enforce[ment] [of] any law[.]'" *Id.* at 228-29, 229 n.5 (quoting Br. for the United States as Amicus Curiae 9, 16, *Wolens*, No. 93-1286 (U.S. June 2, 1994)).

This Court also has twice interpreted the "related to" language in a preemption provision of the Federal Aviation Administration Authorization Act of 1994 (FAAAA). That provision, which was based on the ADA, provides that states "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with

respect to the transportation of property." 49 U.S.C. § 14501(c)(1). *See Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (emphasizing that "the breadth of the words 'related to' does not mean the sky is the limit," and concluding that claims related to a towing company's disposal of a towed vehicle "are 'related to' neither the 'transportation of property' nor the 'service' of a motor carrier"); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371-73 (2008) (holding that provisions of a Maine statute regulating delivery of tobacco products "related to" motor carrier services where they "focus[ed] on trucking and other motor carriers," would require motor carriers to offer services they did not provide or freeze in place existing services, and "directly regulate[d] a significant aspect of the motor carrier's pickup and delivery service").

In the years since the ADA's enactment, frequent flyer programs have proliferated, spurred by the competition the ADA introduced into the industry. The programs began as a marketing mechanism to attract and promote loyalty among high-value customers. *See generally The Big 2-5—Celebrating 25 Years of Frequent Flyer Programs*, InsideFlyer Magazine (May 2006). However, because of partnerships between the airlines and other companies, the programs have turned into a profitable business in their own right. *See Airline Miles: Frequent Flyer Economics*, The Economist (May 2, 2002) ("Frequent-flyer miles started as a marketing gimmick, but they have become a lucrative business."). Consumers can now earn "miles" in many ways besides flying—most notably through credit card partnerships—and can likewise spend their miles on many things besides air transportation, such as on hotels, Broadways shows, sports tickets, and merchandise. *See, e.g.*, Delta, *Use Miles*, https://www.delta.com/content/www/en_US/skymiles/use

-miles.html (detailing ways Delta frequent flyer program members can use miles) (last visited Sept. 10, 2013).

B. Factual Background

Ginsberg is an expert in education and administration who travels extensively throughout the United States and abroad to give lectures, conduct seminars and workshops, and advise other educators and administrators. JA 34. Ginsberg and his wife travel almost exclusively on Northwest, logging approximately 75 flights with the airline each year. *Id.*

Since 1999, Ginsberg has been a member of Northwest's frequent flyer program, known as WorldPerks. *Id.* As a WorldPerks member, Ginsberg spent hundreds of thousands of dollars on Northwest tickets, choosing to fly Northwest even when other airlines offered comparable or better flights. Dist. Ct. Doc. No. 16-2, at ¶ 6. In 2005, Ginsberg achieved Platinum Elite status in the program, the highest level of benefits available. JA 34.

In April 2008, Northwest and Delta Air Lines entered into an Agreement and Plan of Merger, under which Northwest eventually merged into Delta. *Id.* 32-33. Two months later, Ginsberg received a call on his cell phone from a Northwest representative telling him that Northwest was revoking his WorldPerks status, purportedly because he had "abused" the program. *Id.* 35.[1]

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[1]The representative stated that the airline had determined that Ginsberg had complained to the Customer Care line too many times, been bumped from flights too often, and allegedly booked reservations on full flights with the intention of being bumped. JA 35. In fact, Ginsberg contacted customer service in only a small

(continued...)

At that time, Ginsberg's Platinum Elite card showed an expiration date of February 2009. *Id.* Ginsberg, who was in the car when he received the call, asked for the representative's number so he could call her back when he had access to his program records. The representative responded that there was nothing more to discuss, and that he would receive a letter from Northwest officially revoking his status and explaining in detail why it was being revoked. *Id.* 35-36.

Ginsberg did not receive a letter with an explanation from Northwest. Over the following months, he attempted to obtain an explanation and clarification of his status with the WorldPerks program. *Id.* 36-39. In November 2008, Northwest's Customer Care Coordinator sent Ginsberg an email pointing him to paragraph 7 of the WorldPerks Terms and Conditions. *Id.* 60-62. That paragraph states:

> Abuse of the WorldPerks program (including failure to follow program policies and procedures, the sale or barter of awards or tickets and any misrepresentation of fact relating thereto or other improper conduct as determined by Northwest in its sole judgment, including, among other things, violation of the tariffs of Northwest or any partner airline participant in the program, any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest employees' instructions) may result in cancellation of the member's account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of

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[1](...continued)
percentage of the flights he and his wife took and had no control over Northwest's booking or bumping practices. *Id.* 43-44.

> previously issued but unused awards. Any violation of these rules may result in confiscation of tickets at any time (including en route) and the payment by the WorldPerks member or passenger of the full applicable Y, C, J, F or P fare for any segment traveled on program award tickets that have been misused. In connection with the enforcement of any of the terms and conditions governing the WorldPerks program, Northwest Airlines reserves the right to take appropriate legal action, as it deems necessary, and to recover damages, attorneys' fees, and court costs.

Id. 64-65. The email did not state in what way Northwest believed Ginsberg had abused the WorldPerks program.

As a result of the termination, Ginsberg lost valuable rights under the WorldPerks program, including mileage he had already accrued. *Id.* 45-56.

C. Proceedings Below

On January 8, 2009, Ginsberg filed this action against Northwest and Delta (collectively, Northwest) on behalf of himself and others similarly situated. Alleging that revocation of his WorldPerks membership status was "a pretext for cost-cutting in advance of the Delta merger," and that "defendants sought to lower their costs by revoking Program benefits, rights and privileges from Program members who asserted" them, JA 45, the complaint included counts for breach of written contract, breach of the contractual duty of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation. *Id.* 49-55.

With regard to his good faith claim, the complaint explained that "[t]he duty of good faith and fair dealing is implied in the subject contracts." *Id.* 51. "Under this

implied term of the agreements," it continued, "the good faith requirement precludes any action by defendants that would contravene the reasonable expectations of the plaintiff and Class members; even where a party to a contract is given absolute discretion, it must exercise that discretion in good faith in a manner consistent with the reasonable expectations of the other party or parties." *Id.*

The district court granted Northwest's motion to dismiss the complaint. Pet. App. 61. The court held that the claim that Northwest "breached the express terms of the WorldPerks agreement" failed because Ginsberg had not shown a violation of those terms. *Id.* 69. It dismissed the claim without prejudice, giving Ginsberg permission to amend. *Id.* 72. The court held that Ginsberg's other claims were preempted by the ADA and dismissed them with prejudice. *Id.*

Ginsberg moved for reconsideration, which was denied. *Id.* 41. Because he believed that the covenant of good faith and fair dealing was essential to determining whether Northwest breached the contract, Ginsberg filed a notice of voluntary dismissal of the breach-of-written-contract claim and moved for entry of a final judgment so that he could appeal dismissal of the good faith claim. The district court entered final judgment, and Ginsberg appealed solely with respect to his claim that Northwest breached the contract by violating its obligation of good faith and fair dealing.

The court of appeals reversed, explaining that the "purpose, history, and language of the ADA, along with Supreme Court and Ninth Circuit precedent, lead us to conclude that the ADA does not preempt a contract claim based on the doctrine of good faith and fair dealing." *Id.* 3. "Congress's 'manifest purpose' was to make the airline industry more efficient by unleashing the market forces of

competition," the court noted. "[I]t was not to immunize the airline industry from liability for common law contract claims." *Id.*

Northwest petitioned for rehearing and rehearing en banc. While the motion was pending, one of the judges on the panel, Judge Rymer, passed away. The court assigned another judge and issued an amended decision, removing a concurrence by Judge Rymer and a few paragraphs on the definition of "services" that were not necessary to the outcome of the case. The court then denied the petition, with no judge requesting a vote on the petition for en banc rehearing. JA 25-26.

SUMMARY OF ARGUMENT

I. The parties to this case agree on one thing: "This case requires little more than a straightforward application of this Court's pathmarking decision in *Wolens*." Pet'r Br. 14. In *Wolens*, the Court held that although the ADA's preemption provision "bars state-imposed regulation of air carriers," it "allows room for court enforcement of contract terms set by the parties themselves." 513 U.S. at 228. Here, Ginsberg's covenant-of-good-faith claim seeks to apply well-established, contract-law principles to identify and enforce implied contract terms—terms that, like express terms, are part of the contract. Because Ginsberg's covenant-of-good-faith claim asks the court to enforce the parties' contractual commitments, it is not preempted.

Northwest relies on a provision of the WorldPerks contract stating that membership may be terminated for "improper conduct as determined by Northwest in its sole judgment," to argue that Ginsberg seeks to override the contract and impose a non-contractual term. As the Court recognized in *Wolens*, however, the scope of a reservation

of rights is a "question of contract interpretation." 513 U.S. at 234. That a contract contains words such as "sole judgment" does not mean that the parties intended the party with discretion to be able to exercise that discretion in bad faith. And courts are particularly loath to interpret a contract to provide one party with absolute discretion where, as here, doing so would deprive the other party of all benefits of the bargain and could render the contract illusory.

Moreover, Ginsberg's decision not to appeal the dismissal of his breach-of-written-contract claim does not convert his covenant-of-good-faith claim into one based on extra-contractual policies, as argued by the United States. Ginsberg brought two claims alleging that Northwest breached the WorldPerks contract: the "breach-of-written-contract" claim, which alleged that Northwest breached express terms in the contract, and the "breach-of-the duty-of-good-faith-and-fair-dealing" claim, which alleged that Northwest breached implied terms in the contract. Because contracts encompass both express and implied terms, the breach-of-good-faith claim, like the breach-of-written-contract claim, is a claim that Northwest breached the terms of the contract into which it voluntarily entered.

Holding airlines like Northwest to implied terms of their contracts and requiring them to perform those contracts in good faith furthers the ADA's purposes. As this Court recognized in *Wolens*, the competitive market depends on parties' ability to enforce their agreements. Requiring a party to perform in good faith increases the stability of contracts and reduces the costs of entering into them. Northwest relies on the authority of the Department of Transportation (DOT) to investigate unfair and deceptive practices, but DOT's authority does not replace the role of a system for adjudicating private contract

disputes, whether those disputes involve express or implied terms.

II. Even aside from *Wolens*, Ginsberg's claim is not preempted because it does not involve the "enact[ment] or enforc[ement] [of] a law, regulation, or other provision." 49 U.S.C. § 41713(b)(1). Since *Wolens*, this Court has unanimously held that a statutory provision that preempts enforcement of "a law or regulation" does not preempt common-law claims. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002). For the same reasons that the words "a law or regulation" in the Federal Boat Safety Act provision at issue in *Sprietsma* do not encompass common-law duties, the words "a law [or] regulation" in the ADA's preemption provision do not encompass the common law. And because the ordinary meaning of the word "provision" does not extend to common-law duties, the addition of the words "or other provision" underscores that the ADA's preemption provision preempts only positive state enactments, and not common-law claims like Ginsberg's.

III. Ginsberg's claim is also not preempted because it does not relate to airline prices, routes, or services. Although, like the claim in *Wolens*, Ginsberg's claim involves a frequent flyer program, unlike in *Wolens*, his claim does not challenge access to flights and upgrades or the number of miles needed to obtain air tickets. Rather, his challenge is to the termination of his WorldPerks elite membership. This claim does not expressly reference or seek to regulate the price, route, or service of air transportation, and its outcome will not affect such a price, route, or service. The claim does relate to the WorldPerks program, but that program is not itself a "service" within the meaning of the ADA. Indeed, the Department of Transportation advises consumers to "consider legal action through the appropriate civil court" if they are unhappy

with the way a frequent flyer program is administered. Moreover, frequent flyer miles can be earned and spent on many things unrelated to air transportation, such as concert tickets, jewelry, newspapers, and golf clubs. Consumers' ability to be active participants in frequent flyer programs without buying a single airline ticket underscores the distance between the administration of a frequent flyer program and the prices, routes, and services Congress intended to deregulate when it enacted the ADA.

ARGUMENT

To be preempted by the ADA, a claim must both involve the "enact[ment] or enforce[ment] [of] a law, regulation, or other provision having the force and effect of law" and be "related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b)(1). Ginsberg's claim meets neither of these requirements.

I. Ginsberg's Covenant-of-Good-Faith Claim is Not Preempted Under *Wolens*.

A. Ginsberg's Covenant-of-Good-Faith Claim Seeks to Enforce the Parties' Bargain, Not to Expand It.

In *Wolens*, this Court held that although the ADA preempts "state-imposed regulation of air carriers," it does not preempt contract claims that seek to enforce "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." 513 U.S. at 223, 238. The Court explained that it did not read the ADA's preemption provision "to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 228. Because Ginsberg's claim seeks to enforce the

parties' bargain, without enlargements based on state policies, his claim is not preempted.

Like the contract claim in *Wolens*, Ginsberg's covenant-of-good-faith-and-fair-dealing claim involves the parties' "self-imposed undertakings." *Id.* at 228. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205. A claim of breach of the covenant of good faith is dependent on the parties' having voluntarily entered into a contract, and "does not extend to actions beyond the scope of the underlying contract." *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 503 (Minn. 1995). Claims "defined by the contractual obligation of good faith, . . . involve contract interpretation" and "ultimately depend[] upon the terms of the agreement between the parties." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 216, 218 (1985).

Rather than imposing external policies, the requirement that contracts be performed in good faith is a "means of finding within a contract an implied obligation not to engage in [a] particular form of conduct . . . by honoring the reasonable expectations created by the autonomous expressions of contracting parties." *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.); *see* Restatement (Second) of Contracts § 205 cmt. a ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party[.]"). "The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes." *Foley v. Interactive Data Corp.*, 765 P.2d 373,

394 (Cal. 1988). It "is about securing to the parties the sort of good faith performance that, in the particular circumstances of the case at hand, they reasonably thought they were securing at the time they entered the bargain," "not about . . . 'creat[ing] new rights and duties inconsistent with express contractual terms,' or 'achiev[ing] an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract.'" *Flood v. ClearOne Comm'ns, Inc.*, 618 F.3d 1110, 1122 (10th Cir. 2010) (citations omitted).[2]

Northwest and the United States note that some scholars and courts have used the term "good faith and fair dealing" to describe the imposition of external notions of fairness. Similarly, some plaintiffs have attached the label "good faith and fair dealing" to their claims when the claims looked to external state or federal policies instead of to the contracts' purpose and parties' expectations. *See, e.g., Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36 (1st Cir.

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[2] *See also, e.g.*, Uniform Commercial Code (U.C.C.) § 1-304 cmt. 1 ("[T]he doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness . . . ."); E. Allan Farnsworth, *Good Faith Performance & Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 669 (1963) (explaining that there are many varieties of good faith in the law in general but that "good faith performance . . . represents a specific application of the general obligation of good faith—resulting in an implied term of the contract requiring cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations"); *Market St. Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 596 (7th Cir. 1991) (Posner, J.) (equating the duty of good faith with reading a contract to contain "such implied conditions as are necessary to make sense of the contract").

2007). This case, however, does not present the question whether claims asserting such theories of good faith and fair dealing are preempted because Ginsberg's claim is not based on such theories. It is based on the more common notion of "*contractual* good faith—one that is rooted in respect for the parties' purposes and expectations, understood in the context in which they made their agreement." Steven J. Burton & Eric G. Anderson, *Contractual Good Faith* § 1:1, at 3 (1995); *see also id.* (noting that the other "approaches are not at this time well recognized as law insofar as legislation and judicial practice establish the law"). Ginsberg's complaint specifies that "[u]nder this implied term of the agreements, the good faith requirement precludes an action by the defendants that would contravene the reasonable expectations of the plaintiff and Class members." JA 51. And Minnesota courts recognize that "[c]ourts employ the good faith performance doctrine to effectuate the intentions of parties, or to protect their reasonable expectations." *Cardot v. Synesi Grp. Inc.*, 2008 WL 4300955, at *8 (Minn. Ct. App. Sept. 23, 2008) (citation omitted); *Allen v. Thom*, 2008 WL 2732218, at *4 (Minn. Ct. App. July 15, 2008) (citation omitted).[3]

Accordingly, Northwest is incorrect that Ginsberg's covenant-of-good-faith claim "seeks to enlarge the parties' voluntary agreement by enforcing state policies external to the agreement." Pet'r Br. 20. Rather, Ginsberg's claim seeks to construe the agreement into which the parties voluntarily entered, by looking not only to the express terms of the contract but also to the terms that are implied in it. This Court has long recognized that "[w]hat is

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[3]The district court determined, in considering the breach-of-written-contract claim, that Minnesota's law applies. Pet. App. 70.

implied in a . . . contract is as much a part of it as what is expressed." *United States v. Babbitt*, 95 U.S. 334, 336 (1877); *see also Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 329 (1927) ("[A] contract includes, not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made."). Requiring parties to perform their contracts in accordance with the contracts' implied terms does not require the imposition of external state policies any more than does requiring parties to perform the express terms of their contracts.

The differences between Ginsberg's claim and a claim of unconscionability help to demonstrate why this case falls within the category of cases that *Wolens* holds is not preempted. The doctrine of unconscionability provides a means for a court to invalidate a contract agreed to by the parties. Under the doctrine, "[i]f a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." Restatement (Second) of Contracts § 208 (1981). Because the contract is not enforced, even though the parties contemplated all of its terms, the doctrine of unconscionability involves the imposition of external policies.

In contrast, Ginsberg's claim does not seek to avoid enforcement of the contract. Rather, he seeks damages, specific performance, and an injunction—typical breach-of-contract remedies. Moreover, Ginsberg's claim does not try to second-guess the contract or replace it with a state's "'own public policies or theories of competition or

regulation on the operations of an air carrier.'" *Wolens*, 513 U.S. at 229 n.5 (citation omitted). Instead, this case seeks to hold Northwest to its contractual obligations, including those impliedly included in the contract. Accordingly, it is not preempted.

B. Ginsberg's Claim Seeks to Enforce the Contractual Limits on the "Sole Judgment" Language.

Claiming that Ginsberg "quite plainly" seeks to expand the contract, Pet'r Br. 22, Northwest points repeatedly to language in the WorldPerks contract providing that Northwest can revoke a person's membership based on "improper conduct as determined by Northwest in its sole judgment." JA 64. The term "sole judgment," however, is not a trump card. Ginsberg's claim seeks to construe the meaning and limits on that contractual term, not to override it.

As then-Judge Scalia explained in evaluating a "sole discretion" clause in *Tymshare*, the "mere recitation of an express power is not always the test" for determining whether a contract leaves "decisions absolutely to the uncontrolled discretion of one of the parties." 727 F.2d at 1153 (citation omitted). Rather, "the reasonably understood effect of an expansive modifier varies from case to case depending upon the nature of the power at issue." *Id.* at 1154. "Where what is at issue is the retroactive reduction or elimination of a central compensatory element of the contract—a large part of the *quid pro quo* that induced one party's assent—it is simply not likely that the parties had in mind a power quite [so] absolute." *Id.*

Thus, when a court relies on the doctrine of good faith to assess the limits of a phrase such as "sole judgment," it

is not looking to external state policies to alter the agreement; it is interpreting the scope of the parties' voluntary undertakings in light of the parties' purposes and reasonable expectations. Moreover, courts recognize that parties are particularly unlikely to have intended a sole discretion clause to give a party absolute power where doing so would render the contract illusory—that is, when it would render the contract unenforceable because one party has not provided consideration. *See, e.g., White Stone Partners, LP v. Piper Jaffray Cos.*, 978 F. Supp. 878, 882 (D. Minn. 1997) (determining that "the Minnesota Supreme Court would require a party to exercise good faith in exercising an unlimited discretionary power over a term of the contract if necessary to effectuate the parties' intent and to save a contract from being held to be illusory"); *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 193 (N.H. 1989) (Souter, J.) ("[U]nder an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting.").

Here, Northwest claims an absolute power not just to eliminate a substantial portion of the agreement's value, but to eliminate all of it; it claims a right to unilaterally terminate a WorldPerks member's membership for any reason or no reason at all and to deprive that member of all of the miles and benefits he had accrued in reliance on the terms of the program contract. Although Northwest and Ginsberg each clearly intended to enter into an enforceable contract—Northwest, for example, repeatedly refers to the "contractual terms" in its brief, *see, e.g.*, Pet'r Br. 22—if

Northwest is right, it will have promised nothing in the contract. Under these circumstances, applying the covenant of good faith to enforce the limits on the term "sole judgment" reflects, rather than overrides, the parties' voluntary undertakings.

Notably, the contract claim at issue in *Wolens* itself involved the interpretation of an express reservation of rights. As discussed above, in *Wolens*, the plaintiffs challenged changes to American's frequent flyer program. The parties agreed that American had expressly reserved the right in its frequent flyer contract to make changes to the program, but they disagreed about whether American was allowed to do so retroactively. 513 U.S. at 225.[4] Relying on the express reservation, American argued (among other things) that even if the ADA did not preempt claims that enforce contractual obligations, the plaintiffs' contract claims would be preempted because they "inescapably depend on state policies that are independent of the intent of the parties." 513 U.S. at 233 (quoting Am. Airlines Reply Br. 3, *Wolens*, No. 93-1286, 1994 WL 455228 (U.S. Aug. 19, 1994)). "The state court cannot reach the merits," the airline contended, "unless it first invalidates or limits [American's] express reservation of the right to change [American's frequent flyer program's] rules contained in [the frequent flyer] contracts." *Id.* at 233-34 (quoting Am. Airlines Reply Br. 3, *Wolens*). Moreover, American made clear that the doctrine that might apply to limit its express reservation of rights was the doctrine of good faith and fair dealing, specifically noting that "[i]n

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[4]The reservation of rights stated that the program's rules, regulations, and awards were "subject to change without notice" and that American reserved the right "to terminate the . . . program at any time." Br. for United States 6 n.4, *Wolens* (citing American Airlines AAdvantage Program Brochure (4/87)).

Illinois [the] 'covenant of fair dealing and good faith . . . implied into every contract' . . . 'imposes a limitation on the exercise of discretion vested in one of the parties to a contract.'" Am. Airlines Reply Br. 18, *Wolens* (citation omitted).

The Court rejected as "unpersuasive" American's argument that the plaintiffs' claims "inescapably" relied on external state policies, stating that American's argument "assume[d] the answer to the very contract construction issue on which plaintiffs' claims turn: Did American, by contract, reserve the right to change the value of already accumulated mileage credits[?]" 513 U.S. at 234. The Court explained that "[t]hat question of contract interpretation has not yet had a full airing" and that it "intimate[d] no view on its resolution." *Id.* It affirmed the judgment of the Illinois Supreme Court to the extent the state court had allowed the contract claim to proceed. In other words, the Court recognized that the scope of the reservation-of-rights provision was an issue of contract interpretation, although no such limits were expressly stated in the contract. Further, although American had explained that the state court might use the covenant of good faith and fair dealing to interpret the limits on the reservation of rights, the Court allowed the claim to proceed, without suggesting that the state court was barred from relying on the covenant in resolving the claim. Likewise, here, the scope of Northwest's ability to terminate a person's WorldPerks membership is an issue of contract interpretation, and this claim should be allowed to proceed.

C. Ginsberg's Decision Not to Appeal His Breach-of-Written-Contract Claim Is Irrelevant to Whether the ADA Preempts His Covenant-of-Good-Faith Claim.

In contrast to Northwest, the United States agrees that when used to "'effectuate the intentions of parties, or to protect their reasonable expectations,'" U.S. Br. 24 (citation omitted), covenant-of-good-faith claims "could constitute one form of adjudicating 'routine breach-of-contract claims'" under *Wolens* and "would not be preempted by the ADA." *Id.* at 26 (quoting *Wolens*, 513 U.S. at 323). Moreover, the United States recognizes that under Minnesota law, a party might be able to "maintain a claim—whether under the rubric of an implied covenant of good faith and fair dealing or otherwise—on the theory that the other party exercised a contractual grant of discretion in a manner not contemplated by the parties at the time of the contract's formation." *Id.* at 19.

Ginsberg's claim is exactly the type of good faith claim that the United States describes. It seeks to effectuate and protect the intentions and expectations of the parties: The complaint specifies that "the good faith requirement precludes any action by the defendants that would contravene the reasonable expectations of the plaintiff," JA 51, and alleges that "even where a party to a contract is given absolute discretion, it must exercise that discretion in good faith in a manner consistent with the reasonable expectations of the other party or parties." *Id.*

Nonetheless, according to the United States, because Ginsberg also brought a breach-of-written-contract claim, and because he did not appeal the loss of that claim, "the district court's holding that petitioner did not breach any obligation undertaken by petitioner under the terms of the contract itself would appear to be controlling here." U.S.

Br. 19. That is, according to the United States, because Ginsberg did not appeal the claim entitled "breach of written contract," his covenant-of-good-faith claim "seeks to impose a non-contractual limitation on petitioner." *Id.* at 10.

The United States' argument misunderstands Ginsberg's claims. The Federal Rules of Civil Procedure allow a plaintiff to set out "two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones." Fed. R. Civ. P. 8(d)(2). Ginsberg's complaint included two separate counts alleging that he breached the contract: one alleging a "breach of written contract," JA 49, and a second alleging a "breach of the duty of good faith and fair dealing . . . implied in the subject contracts." JA 51. In other words, his first claim alleged that Northwest violated the *express* terms of the contract, and his second claim alleged that Northwest violated the *implied* terms of the contract. Minnesota law recognizes that it is appropriate to treat express and implied contract claims as separate claims. *See, e.g.*, *In re Hennepin*, 540 N.W.2d at 503 (considering separate "claims for breach of express and implied contract provisions" and explaining that "[t]o allege an implied covenant claim the bondholders need not first establish an express breach of contract claim—indeed, a claim for breach of an implied covenant of good faith and fair dealing implicitly assumes that the parties did not expressly articulate the covenant allegedly breached"); *Columbia Cas. Co. v. 3M Co.*, 814 N.W.2d 33, 37 (Minn. App. 2012) (concluding that Minnesota law allows plaintiffs to plead "alternative theories: breach of the express terms of the insurance policies and breach of a provision that is read into most contracts under Minnesota law, namely, the implied covenant of good faith and fair dealing").

Determining that it could not look beyond the contract's "express terms," Pet. App. 71, the district court held that the breach-of-written-contract claim failed because the express terms of the contract stated that Northwest could cancel members' accounts based on "'improper conduct as determined by Northwest *in its sole judgment*.'" *Id.* (quoting JA 64). And it held that the implied contract claim—that is, the good faith claim—was preempted under *Wolens*. *Id.* 69. Because the contract does not contain express limitations on the term "sole judgment"—rather, those limitations are implied contract terms—Ginsberg appealed only the district court's holding with regard to the implied contract claim. But his decision not to appeal the determination that the express terms of the contract do not contain limitations on "sole judgment" does not mean that he accepted or conceded that the contract as a whole does not contain limitations on that term. A contract includes not only "the promises set forth in express words," but also its "implied provisions." *Sacramento Nav. Co.*, 273 U.S. at 329; *see Columbia Cas. Co.*, 814 N.W.2d at 37 ("[I]t is well settled that a contract includes not only the terms set forth in express words, but in addition all implied provisions indispensable to effectuate the intention of the parties and carry out the contract . . . .") (quoting *Watson Bros. Transp. Co. v. Jaffa*, 143 F.2d 340, 348 (8th Cir. 1944)); *Allen*, 2008 WL 2732218, at *2 ("[The plaintiff's arguments] both regard breach of contract, although they are presented in separate terms as breach of contract and breach of the implied covenant of good faith and fair dealing. A breach of the implied covenant is itself a breach of the contract.").

Under the United States' position, whether the ADA preempts covenant-of-good-faith claims would vary by state depending on how such claims are pleaded within the state. In some states, the covenant of good faith is not

treated as a separate claim, but considered as part of a breach-of-contract claim. *See, e.g., Indus. Specialty Chems., Inc. v. Cummins Engine Co., Inc.*, 902 F. Supp. 805, 811 (N.D. Ill. 1995) (applying Illinois law). In such a state, if a district court held that the express terms of the contract provided the defendant with absolute discretion, and that the ADA preempted reliance on the covenant of good faith, a plaintiff who wanted to appeal the determination regarding the covenant of good faith would necessarily appeal the breach-of-contract claim, and the United States' concerns about an unappealed dismissal of the breach-of-contract claim would not arise. Here, however, because the covenant-of-good-faith claim was pleaded separately from the breach-of-written-contract claim, to appeal the ruling that the ADA preempted reliance on the covenant of good faith, Ginsberg appealed only the covenant-of-good-faith claim. Whether the ADA preempts reliance on the covenant of good faith, however, should not depend on whether or not it was pleaded as a separate claim. And it would be nonsensical to require Ginsberg to appeal his claim for breach of the express terms of the contract along with his claim for breach of the implied terms, when his argument is not that the district court erred in its holding with regard to express terms, but that it erred in its holding with regard to the implied terms.

D. Ginsberg's Claim Furthers the ADA's Policies.

As in *Wolens*, allowing Ginsberg to pursue his contract claim here furthers the ADA's goal of "placing maximum reliance on competitive market forces." 49 U.S.C. § 40101(a)(6). As the Court explained, "[t]he stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time," *Wolens*,

513 U.S. at 230 (quoting Br. for United States 23, *Wolens*)—an observation that applies equally to express and implied contract terms. Moreover, "[t]he good faith performance doctrine may be said to enhance economic efficiency by reducing the costs of contracting." Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 393 (Dec. 1980). It decreases the need for "costly defensive expenditures, in the form of overelaborate disclaimers or investigations into the trustworthiness of a prospective contract partner." *Market St. Assocs.*, 941 F.2d at 594.

Northwest and the United States stress the benefits to competition of allowing airlines flexibility to maintain discretion in their airline programs. The issue here, however, is not whether airlines can write contracts in which they maintain significant discretion. Rather, the issue is whether the consumer can enforce limits on that discretion based on the parties' reasonable expectations, the contract's purpose, and the parties' intent to have entered an enforceable contract. The outcome will determine, for example, whether, if an airline maintains the ability to terminate frequent flyer program membership for "improper conduct . . . in its sole judgment," the airline is free to decide that it would be "improper conduct" for a frequent flyer program member ever to try to use his miles.

Northwest points to language in a *Wolens* footnote observing that "contract law is not at its core 'diverse, nonuniform, and confusing,'" 513 at 233 n.8, and thus that the Court saw "no large risk of nonuniform adjudication inherent in '[s]tate-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide.'" *Id.* (citations omitted). Northwest devotes a significant part of its brief to arguing

that "the precise opposite is true with respect to the implied covenant." Pet'r Br. 29. But although there are some differences in how states apply the covenant of good faith, that is also true of other contract-law principles. As the United States noted in *Wolens*, "different courts adjudicating a claim for breach of a contract of carriage or a frequent flyer contract might be called upon to apply background principles of state contract law and might reach different results." Br. for United States 27, *Wolens*.

Moreover, the covenant of good faith *is* a principle at the "core" of contract law. *Wolens*, 513 U.S. at 233 n.8. It is widely accepted by the states and recognized in both the Restatement and the UCC. *See Alabama v. North Carolina*, 130 S. Ct. 2295, 2312 (2010) (recognizing that "[o]f course" every contract imposes a duty of good faith). And courts routinely employ the covenant of good faith where a contract confers discretion on one party, particularly where refusing to apply the covenant would render the contract illusory. *See, e.g.*, Farnsworth on Contracts § 7.17 (4th ed. 2004) ("Courts have often supplied a term requiring a party to exercise good faith when that party has been given a discretionary power over one of the terms of the contract."); *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 542 (4th Cir. 1998) (Luttig, J.) ("[I]t is a basic principle of contract law . . . [that] a party may not exercise contractual *discretion* in bad faith, even when such discretion is vested solely in that party."); *see also, e.g., Cavendish Farms, Inc. v. Mathiason Farms, Inc.*, 792 N.W.2d 500, 506 (N.D. 2010); *Potlatch Educ. Ass'n v. Potlatch Sch. Distr. No. 285*, 226 P.3d 1277, 1281 (Idaho 2010); *Kennedy Assocs., Inc. v. Fischer*, 667 P.2d 174, 180 (Alaska 1983); *Midwest Mgmt. Corp. v. Stephens*, 291 N.W.2d 896, 913 (Iowa 1980).

Northwest cites five cases for the proposition that "many states reject out of hand implied covenant claims where . . . [contractual terms] expressly give one party sole discretion to take particular actions." Pet'r Br. 33. In four of those cases, however, interpreting the contract to provide one party with absolute discretion did not deprive the other party of all benefits of the contract. *See, e.g.*, *Hobin v. Coldwell Banker Residential Affiliates, Inc.*, 744 A.2d 1134, 1138 (N.H. 2000) (noting that good faith and fair dealing would apply to protect an agreement that would otherwise be rendered illusory, but finding that the contract at issue was supported by other consideration). And in the fifth case, the court in fact recognized that, despite the grant of "exclusive control, discretion, and judgment" to the defendant, there were acts that, if proved by the plaintiff, would have shown bad faith. *Continental Potash, Inc. v. Freeport-McMoran, Inc.*, 858 P.2d 66, 82-83 (N.M. 1993).[5]

If the ADA preempted state-law contract claims based on implied terms, there would be no way for consumers to hold airlines to those self-imposed terms. As the Court pointed out in *Wolens*, "DOT has neither the authority nor the apparatus required to superintend a contract dispute

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[5]Northwest also devotes significant attention to employment cases, *see* Pet'r Br. 33-35, but employment is a special context in which, because of the at-will employment doctrine, many states do not apply the covenant at all. *See, e.g.*, James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith & Fair Dealing in American Employment Law*, 32 Comp. Lab. L. & Pol'y J. 773, 773-74 (Spring 2011) (explaining that although the covenant of good faith is "an accepted feature of contractual relations in the United States" most states "have declined to apply Good Faith at all when reviewing disputes between employers and individual employees" and grounding that reluctance in "the robust persistence of the employment-at-will doctrine").

resolution regime." 513 U.S. at 232. "Nor is it plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services." *Id.* Northwest devotes significant attention to DOT's ability to investigate unfair or deceptive practices, 49 U.S.C. § 41712, arguing that this authority "stands in stark contrast to its capacity to address 'routine breach-of-contract' claims." Pet'r Br. 40. But that argument is a non sequitur. Although DOT had authority to police unfair and deceptive practices at the time of *Wolens*, the Court recognized that such authority did not replace the need for a system of adjudicating contract disputes. *Wolens*, 513 U.S. at 232. Ginsberg's claim for breach of the covenant of good faith and fair dealing falls within that category. Because he seeks to hold the airline to its voluntary, contractual undertakings, his claim is not preempted under *Wolens*.

II. Common-Law Claims Are Not Based on "a Law, Regulation, or Other Provision."

A. Even apart from *Wolens*, Ginsberg's claim is not preempted because it does not involve the "enact[ment] or enforce[ment] [of] a law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 41713(b)(1). Since *Wolens* was decided, this Court has unanimously held that statutory language preempting "a law or regulation" did not preempt common-law claims. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (interpreting the Federal Boat Safety Act, 46 U.S.C. § 4306). The Court explained that "the article 'a' before 'law or regulation' implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law." *Id.* It noted that "because 'a word is known by the company it keeps,' . . . the terms 'law' and

'regulation' used together in the preemption clause indicate that Congress preempted only positive enactments." *Id.* (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). And it observed that "[i]f 'law' were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the preemption clause superfluous." *Id.*

For these same reasons, the words "a law [or] regulation" in the ADA do not include common-law claims. As in the Boat Safety Act, the phrase "law, regulation, or other provision" in the ADA is preceded by the article "a," demonstrating a discreteness not present in common law. As in the Boat Safety Act, the doctrine that words are known by the company they keep indicates that "law," like "regulation," includes only positive enactments. And as in the Boat Safety Act, if "law" were read to include common law, it might also be read to include "regulation[s]" and "other provision[s] having the force and effect of law," rendering those terms superfluous.

Indeed, because the words "a law [or] regulation" in the ADA are followed by "other provision having the force and effect of law," it is even clearer here than in *Sprietsma* that "law" and "regulation" do not include common law. In both its everyday and its legal meaning, "provision" refers to a stipulation or specific clause in a law or other legal instrument. *See, e.g.*, *Black's Law Dictionary* (9th ed. 2009) (defining provision as "[a] clause in a statute, contract, or other legal instrument . . . [a] stipulation made beforehand"); *Webster's Third New Int'l Dictionary* 1827 (1981) (defining provision as "a stipulation (as a clause in a statute or contract) made in advance; proviso"). It is natural to speak of a provision of a contract, a local health code, or a lease. But the common-law principles on which

Ginsberg relies are not "provision[s]" under the ordinary meaning of that term. Moreover, like "law" and "regulation," "provision" is preceded by the word "a," which involves a discreteness not present in the common law, and if "provision" were interpreted broadly enough to include the common law, the word "regulation," at the least, would be superfluous. *See* 537 U.S. at 63.

Thus, the phrase "other provision having the force and effect of law" does not itself include the common law. Instead, it ensures that a positively enacted or promulgated requirement with the force and effect of law will fall within the scope of the preemption provision, even if the measure is not denominated a statute or regulation. For example, the concession agreement provisions at issue in *American Trucking Ass'n v. City of Los Angeles*, 133 S. Ct. 2096 (2013), were "other provision[s] having the force and effect of law." And by referring to "other provision" after "law" and "regulation," the statute reinforces that the only laws and regulations that are preempted are those that are also contained in "provision[s]"—that is, those that are positively enacted or promulgated, not common-law principles.

B. In *Sprietsma*, the Court noted that its conclusion that the Boat Safety Act's preemption provision does not preempt common-law claims was "buttressed" by the Act's saving clause, which states that "'"[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."'" 537 U.S. at 63 (quoting 46 U.S.C. § 4311(g)). Likewise, here, when Congress enacted the ADA, it retained the existing saving clause in the Federal Aviation Act, which stated that "[n]othing contained in this [Act] shall in any way abridge or alter the remedies now existing at common law or by statute." 49

U.S.C.App. § 1506 (1988). In 1994, Congress revised the saving clause to provide that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c)). As in *Sprietsma*, this "'saving clause assumes that there are some significant number of common-law liability cases to save [and t]he language of the pre-emption provision permits a narrow reading that excludes common-law actions.'" 537 U.S. at 63 (quoting *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 868 (2000)); *cf. Wolens*, 513 U.S. at 232 (recognizing that the saving clause informs interpretation of the preemption clause).

C. The United States notes that until 1994, the ADA preempted "any law, rule, regulation, standard, or other provision having the force and effect of law . . ." and that Congress did not intend to make any substantive change when it revised the language to its current form. U.S. Br. 31-32 (quoting ADA, Pub. L. No. 95-504, § 4(a), 92 Stat. 1708). Based on the pre-1994 language, it argues that there is no reason to conclude that Congress did not intend to preempt common-law claims. The current statutory language, however, should not be stretched beyond its plain meaning based on language deleted by Congress nearly 20 years ago. Moreover, the reason Congress removed the words "rule" and "standard" was because it considered them superfluous, suggesting that it thought they, like law, regulation, and other provision, referred to positive enactments. The House Report on the recodification specifies that Congress removed "rule" because it was "synonymous with 'regulation.'" H.R. Rep. No. 103-180, 103d Cong., 1st Sess. 305 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818. Similarly, the report specifies that Congress removed "standard" because it was "surplus." *Id.* And although the word "standard" can sometimes refer to common-law standards, it can also be used to refer to

statutory or regulatory criteria. *See, e.g.*, ADA, Pub. L. No. 95-504, § 4(a) (providing that the "Administrator, by regulation, shall establish safety standards"); *cf. Geier*, 529 U.S. at 867-68 (holding that an express preemption provision that preempted "any safety standard" did not preempt common-law actions). Thus, the prior version of the statute was ambiguous at best about whether it covered common-law duties. And by amending the language, Congress made clear that the current language best expressed its intent.

Further this Court has recognized that the ADA's "relating to" language is identical to that in the Employee Retirement Income Security Act of 1974 (ERISA). *Morales*, 504 U.S. at 383-84. Notably, however, in drafting the ADA, Congress did not adopt the threshold language from ERISA's preemption provision, which states that ERISA "supersede[s] any and all State laws," 29 U.S.C. § 1144(a), and specifically defines "State law" as including "all laws, *decisions*, rules, regulations, or *other state action* having the effect of law." *Id.* § 1144(c)(1) (emphasis added); *see* ERISA, Pub. L. No. 43-406, § 514, 88 Stat. 829 (1974). Likewise, although the prior version of the preemption provision was similar to the Federal Railroad Safety Act (FRSA) provision at issue in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), it differed noticeably from that provision by excluding the word "orders."[6]

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[6]The FRSA provision at issue in *CSX Transportation* preempted "any law, rule, regulation, order, or standard relating to railroad safety." *CSX Transportation*, 507 U.S. at 664 (quoting 45 U.S.C. § 434 (1988 & Supp. II)). The United States cites *CSX Transportation* for the proposition that "[t]his Court has construed references to 'standards' in preemption provisions as encompassing state common-law claims." U.S. Br. 32. In its brief in *Wolens*,

(continued...)

Congress used both the words "decisions" and "orders" elsewhere in the ADA, but not in the preemption provision. Congress's decision not to include words such as "decisions" and "orders" in the preemption provision, despite their use in ERISA and the FRSA, further suggests that Congress did not intend the prior or current language to preempt common-law claims, and that the current language should be interpreted in accordance with its plain meaning to preempt only positive state enactments.

D. The conclusion that a preemption provision pre-empts only positive state enactments, not common-law claims, "does not produce anomalous results." *Sprietsma*, 537 U.S. at 64. It is "perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims." *Id.*; *see also, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) ("[T]here is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions.").

Indeed, given the purposes of the ADA and its preemption provision, it is particularly rational for Congress to have preempted only positive state

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[6](...continued)
however, the United States focused on the word "orders" in FRSA's preemption provision, suggesting that the word "orders" extended the preemption provision to contract claims and made it meaningfully broader than the ADA's preemption provision. *See* Br. for United States 18 & n.10, *Wolens* (noting that *CSX Transportation* "quote[s] [a] statutory reference to preempted state law that includes 'orders'" and pointing out that the ADA's preemption provision does not preempt "'orders' or 'decisions'").

enactments. Congress enacted the ADA to free the airlines from the public-utility-style oversight of the Civil Aeronautics Board (CAB). The House Report accompanying the ADA explained that under the pre-ADA regulatory system, airlines were "subject to extensive economic regulation by the CAB," noting that "airline management does not have the same control over basic operational decisions as management in other industries." H.R. Rep. No. 95-1211, at 2. The purpose of the ADA was to replace this extensive economic regulation with "competitive market forces to determine the quality, variety, and price of air services." Pub. L. No. 95-504, 92 Stat. 1705. The purpose of the preemption provision, in turn, was to prevent conflicts between federal and state regulation and "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378. Congress showed no intent to deprive injured people of traditional state-law remedies. It "is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). "If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Given the ADA's purpose of preventing states from recreating the CAB's public-utility-style regulation, along with the ADA's language and structure, the ADA's preemption provision should not be read to deprive airline customers of traditional state common-law claims.

III. Ginsberg's Claim Does Not Relate to Air Carrier Prices, Routes, or Services.

Ginsberg's claim is also not preempted because it is not "related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b)(1). Unlike in *Wolens*, in which the plaintiffs' claims related to access to and charges for flights and upgrades, Ginsberg's claim relates solely to his membership in the WorldPerks program. The WorldPerks program is not itself a "service" under the ADA, and Ginsberg's claim is not sufficiently related to the "services" that Northwest provides to be preempted.

A. Northwest contends that Ginsberg's claim is preempted because it "directly challenges Northwest's administration of its frequent flyer program." Pet'r Br. 17. But the WorldPerks program is not a "service" under the ADA, and thus Ginsberg's claim is not preempted simply because it involves that program.

The word "service" does not encompass very activity undertaken by an air carrier. If an airline owned a restaurant, ran a dry cleaner, or managed a sports team, it would not be immunized from following state laws relating to those activities simply because it is an airline. Rather, the "service" referred to in the ADA is the service customers are buying when they buy their airline ticket: the service of "provid[ing] air transportation." 49 U.S.C. § 41713(b)(1).[7]

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[7] As Northwest's petition notes (at 26-27), the courts of appeals are split over whether the "service" of providing air transportation within the meaning of the ADA includes only "the provision of air transportation to and from various markets at various times," *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir.

(continued...)

Thus, in *Dan's City Used Cars*, the Court held that claims related to the storage and disposal of a towed car "survive preemption under [the FAAAA] because they are unrelated to a 'service' a motor carrier renders its customers." 133 S. Ct. at 1779. Although the conduct on which the claims were based was performed by a motor carrier, and although the claims involved the treatment of a towed car, the Court recognized that the claims did not relate to services in the relevant sense because they did not have the requisite connection to "any *transportation* services a motor carrier offers its customers." *Id.* (emphasis added).[8]

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[7](...continued)
1998) (en banc), or whether it includes other "features of air transportation" that are "appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline," such as "ticketing, boarding procedures, provision of food and drink, and baggage handling." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (citation omitted). Because Ginsberg's claim does not relate to any aspect of air transportation—neither to the point-to-point transportation itself nor to any other services necessarily included within the contract of carriage—this split need not be resolved in this case. *Cf. Dan's City Used Cars*, 133 S. Ct. at 1779 ("We need not venture an all-purposes definition of transportation 'service[s]' in order to conclude that state-law claims homing in on the disposal of stored vehicles fall outside [the FAAAA's] preemptive compass.").

[8]In *Dan's City Used Cars*, the Court also discussed language that is in the FAAAA but not in the ADA—the qualification that the FAAAA preempts state laws related to prices, routes, or services only "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The Court held that the claims there were not preempted because they did not concern a motor carrier's "transportation of property." 133 S. Ct. at 1779. However, the Court then stated that "Pelkey's claims *also* survive preemption
(continued...)

Here, the operation of the WorldPerks program is not an air transportation service. The WorldPerks contract between an airline and a customer is separate from any contract the parties enter into regarding the purchase of airline tickets. *See, e.g.*, *Hodges*, 44 F.3d at 336 (defining services as matters "necessarily included with the contract of carriage"). People can buy tickets on airlines without having any involvement with a frequent flyer program. And people can become members of frequent flyer programs without ever buying an airline ticket. *See* Delta, *Create an Account*, https://www.delta.com/profile/enrollLanding.action (last visited Sept. 10, 2013) (website for enrolling in Delta's SkyMiles program).

Indeed, frequent flyer program benefits can be accrued and spent on many things besides flights and upgrades. Delta's SkyMiles program, for example, into which WorldPerks merged, boasts of over 100 different partners through which the program's members can earn "miles," including credit cards, check cards, financial services, hotel chains, car rental companies, flower delivery services, and

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[5](...continued)
under [the FAAAA] because they are unrelated to a 'service' a motor carrier renders its customers," because the "transportation service Dan's City provided . . . ended months before the conduct on which Pelkey's claims are based." *Id.* (emphasis added). In other words, even apart from the "with respect to the transportation of property" language, the Court recognized that the term "service" in the FAAAA refers solely to "transportation services." *See also id.* at 1778 (agreeing that Pelkey's claims were "'related to' neither the 'transportation of property' nor the 'service' of a motor carrier").

natural gas suppliers.[9] Likewise, miles can be used to subscribe to magazines and newspapers, to see Broadway shows, to bid on items such as front-row seats at sporting events and the opportunity to mingle with celebrities, and to buy merchandise such as alarm clocks and toaster ovens.[10] Thus, a SkyMiles member does not have to buy an airline ticket or travel on an airplane to participate actively in the program. *See* Misty Harris, *Airlines Getting More Creative with Rewards Programs*, Montreal Gazette (Apr. 11, 2012), at B1 ("[A]irlines are expanding redemption options to meet the needs of more people—including those who've never flown a day in their life."). The customer may use the program to subscribe to Glamour, Time, or the Wall Street Journal, to receive tickets to The Phantom of the Opera, Wicked, or Annie, or to buy a watch, jewelry, or a clothes iron. And the customer may earn the miles by using an American Express credit card, opening a Fidelity brokerage account, or buying tools and electronics on Sears.com.

Furthermore, although Northwest (at 37) stresses the role of frequent flyer programs in enhancing customer loyalty, the programs are often profit-making enterprises for airlines apart from their role in attracting customers. In a special report on frequent flyer programs the

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[9] *See* Delta, *Earn Miles with Partners*, http://www.delta.com/content/www/en_US/skymiles/earn-miles/earn-miles-with-partners.html (last visited Sept. 10, 2013).

[10] *See* Delta, *Use Miles*, https://www.delta.com/content/www/en_US/skymiles/use-miles.html; Delta, *SkyMiles Online Auction*, https://www.delta.com/skymiles/use_miles/redemption_partners/skymiles_online_auction/index.jsp (last visited Sept. 10, 2013); Delta, *SkyMiles Marketplace*, https://marketplace.delta.com/ (last visited Sept. 10, 2013).

International Air Transport Association (IATA) explained that "[m]ost airlines have recognized that the programs could be operated as profit centers in their own right." IATA, *Special Report—The Price of Loyalty* (Aug. 2012);[11] *see also id.* (stating that when United filed for bankrupcy in 2002, its frequent flyer program was the only part of its operations that was making money). IATA notes, for example, that Delta generates more than $1 billion annually in payments from companies with which it partners. *Id.*; *see also, e.g.*, Delta Airlines Inc., *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2012* (Form 10-K), at 39[12] (explaining that, in 2011, Delta "amended [its] American Express agreements and agreed to sell $675 million of unrestricted SkyMiles to American Express in each December from 2011 through 2014"). In other words, what began "as a way to win the loyalty of travelers has turned into a lucrative business for the airlines," apart from their role of providing air transportation. Susan Stellin, *Airlines' new cash cow: Frequent flier programs*, N.Y. Times (Apr. 1, 2008).

B. Of course, in addition to operating WorldPerks, Northwest offers air transportation "services" within the

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[11] Available at www.iata.org/publications/airlines-international/august-2012/Pages/loyalty.aspx (last visited Sept. 10, 2013). The IATA report also makes clear that unredeemed miles can be counted as a liability for an airline. *See id.* That unredeemed miles are a liability for the airline can help explain why an airline may have an incentive to remove members who have accrued many miles from the program when the airline is in the process of merging with another airline.

[12] Available at http://www.delta.com/content/dam/delta-www/pdfs/about-financial/DeltaAirLines_10K_2012.pdf (last visited Sept. 10, 2013).

meaning of the ADA. Ginsberg's claim, however, is not sufficiently related to those services to be preempted.

In determining whether a state law relates to prices, routes, or services, the Court has looked to whether the law "directly regulate[s]," *Rowe*, 552 U.S. at 373, "express[ly] reference[s]," *Morales*, 504 U.S. at 388, or has a "forbidden significant effect" on them. *Id.* Here, Ginsberg's claim neither expressly references nor regulates Northwest's provision of air transportation, and his claim would not have a significant effect on it. Northwest states that its frequent flyer program *in general* affects the prices it charges and the services it offers. Pet'r Br. 18. But the question is not whether the existence of the *frequent flyer program* affects prices, routes, and services, but whether this *specific action* would significantly affect prices, routes, and services. *See Morales*, 504 U.S. at 390. It is highly improbable, and certainly not demonstrated, that the determination of whether airlines can terminate customers' elite memberships in their frequent flyer programs without valid cause will have a significant effect on the services airlines provide or the amount air carriers charge for those services.

Despite Northwest's insistence (at 16) that they arise in "precisely the same context," the distance between Ginsberg's claim and the price, route, or service of air travel distinguishes this case from *Wolens*. In *Wolens*, the Court held that claims regarding American Airlines' devaluation of mileage credits, particularly its imposition of "limits on seats available to passengers obtaining tickets with [frequent flyer] credits" and "restrictions on dates credits could be used," were related to prices, routes, or services. *Wolens*, 513 U.S. at 225. Specifically, the Court held that the claims related to "rates,' *i.e.*, American's

charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates." *Id.* at 226. In contrast, Ginsberg's claim does not relate to charges for tickets or seat upgrades, access to flights, or anything else concerning air carriage. It relates solely to his membership in the WorldPerks program.

To be sure, mileage and other benefits accrued through WorldPerks can be used in ways related to air transportation, such as to obtain tickets or upgrades. As Northwest and the United States note (at 18 and 15, respectively), the desire to receive these benefits is the reason Ginsberg cares about his WorldPerks membership. The ability to use benefits on air transportation, however, does not make claims regarding WorldPerks membership related to air transportation prices, routes, and services. Money, like miles, can be spent to procure air transportation, but a claim regarding the opening or operation of a bank account would not be preempted under the ADA, even when the customer was saving specifically to buy an airline ticket. And as discussed above, frequent flyer miles may be used on many goods and services other than tickets or upgrades. As a Delta SkyMiles webpage explains, "We often think miles are just for traveling, but they can be used for so much more." Delta, *Use Miles*, http://www.delta.com/content/www/en_US/skymiles/use-miles.html.

Northwest also notes (at 18) that the WorldPerks program is a means through which it attracts and maintains passengers. Although state laws concerning promotion of air travel may be preempted when they regulate, reference, or significantly affect air transportation prices, routes, and services, *see Morales*,

504 U.S. at 388 (holding that guidelines regulating fare advertising were preempted where they "express[ly] reference[d]" and had a "forbidden significant effect" on fares), they are not preempted where they do not regulate, reference, or affect such prices, routes, or services. In other words, even if they concern a program used to promote air travel, state laws are not preempted where, as here, they do not relate to air transportation.

The absence of a relationship between claims regarding membership in a frequent flyer program and the price, route, or service of air transportation is highlighted by the absence of DOT regulations related to frequent flyer program contracts or membership. As the Department's fact sheet on frequent flyer program notes, the "Department of Transportation does not have rules applicable to the terms of airline frequent flyer program contracts." DOT, *Frequent Flier Programs: How to Make the Right Decision*, http://www.dot.gov/airconsumer/frequent-flier-programs (updated July 23, 2013) (last visited Sept. 10, 2013).[13] Rather, the Department advises consumers to complain directly to the airline about problems with frequent flyer programs. And it tells consumers that "[i]f such informal efforts to resolve the problem are unsuccessful, [the consumer] may wish to consider legal action through the appropriate civil court." *Id.*

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[13] Until shortly before the United States filed its brief in this case, DOT's website more broadly stated that it "does not regulate airline frequent flyer programs." DOT, *Frequent Flier Programs*, http://web.archive.org/web/20130323044558/http://www.dot.gov/airconsumer/frequent-flier-programs (updated Sept. 18, 2012) (archived March 2013) (last visited June 2013).

Because frequent flyer programs reach into numerous different industries, Northwest's position that all state-law claims related to frequent flyer programs are preempted would, if adopted, disable states from protecting consumers who were earning or using miles for non-transportation services or merchandise. For example, credit card purchases reportedly account for 19.7 percent of accrued miles, and telephone companies account for another 9.3 percent of miles. Frequent Flyer Services, *Top 10 Mileage Earnings Methods* (Sept. 10, 2013);[14] *see also In Terminal Decline*, The Economist (Jan. 6, 2005) (stating that "half of all miles are now earned not in the air, but on the ground, notably on credit-card payments"). American Express reported that in 2012 its "Delta SkyMiles Credit Card co-brand portfolio account[ed] for approximately 5 percent of [American Express's] worldwide billed business." American Express Co., *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2012* (Form 10-K), at 105.[15] Thus, if all claims regarding frequent flyer programs were preempted, states would not be able to enforce laws protecting consumers who were denied promised mileage from their credit card or phone companies. Particularly given that frequent flyer programs as we know them did not exist at the time of the ADA, it is unimaginable that, when it deregulated the airline industry, Congress intended to deny states the ability to regulate in these areas far outside the field of

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[14] Available at http://www.frequentflyerservices.com/press_room/facts_and_stats/top_ten.php (last visited Sept. 10, 2013).

[15] Available at http://ir.americanexpress.com/Cache/1500047528.PDF?Y=&O=PDF&D=&FID=1500047528&T=&IID=102700 (last visited Sept. 10, 2013).

transportation. The scope of frequent flyer programs extends far beyond airline prices, routes, and services, and claims related to membership status in a frequent flyer program are not preempted by the ADA.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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No. 12-462

In the
Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., and DELTA AIR LINES, INC., a Delaware corporation,

Petitioners,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Petitioners hereby incorporate by reference the corporate disclosure statement included in their opening brief on the merits, which remains current.

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REPLY BRIEF FOR PETITIONERS

Respondent purports to agree that this case involves little more than a straightforward application of *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). *See* Resp. Br. 10. But every argument he makes is either completely or substantially foreclosed by *Wolens*. Nowhere is this more obvious than in Respondent's stunning claim that airline frequent flyer programs do not relate to airline prices, routes, or services. *Wolens*, of course, involved a frequent flyer program, and this Court found the relationship between the program and prices and services so obvious that it did not dwell long on the matter. There is no material difference between this case and *Wolens*; the plaintiffs there complained about lost upgrades and additional blackout dates, while Respondent complains about losing access to such services and effective price discounts entirely. *Wolens* is controlling on the "relates to" question.

Respondent also claims that his implied covenant of good faith and fair dealing claim, unlike some other implied covenant claims, does not involve the enforcement of state law, but rather seeks to enforce the parties' voluntary undertakings. But *Wolens* made clear that some claims that sound in contract could involve the enforcement of state law and thus trigger preemption. Respondent's implied covenant claim is a paradigmatic example. Respondent brought an ordinary, or to use his term "express," contract claim to enforce the parties' voluntary undertakings, and he lost on the merits. The separate implied covenant claim is different; it

seeks to enlarge the parties' voluntary undertakings. As the district court correctly recognized, those implied terms are a product of state law. It is the state law (and not just the parties' voluntary undertakings) that is being enforced, which under *Wolens* means the claim is preempted. And given the varieties and vagaries when it comes to the law of implied covenants, Respondent's position would produce the patchwork and uncertainty the ADA was designed to eliminate.

Finally, respondent contends that no common-law claim—whether for fraud, unfair dealing, negligence, or anything else—is preempted by the ADA. That is an astonishing claim. It would render *Wolens*' entire discussion of breach-of-contract claims unnecessary. Rather than discuss whether such claims relate to prices and services and enforce state law, this Court could have simply observed that they escaped preemption based on their common-law status alone. It would also mean that the countless lower court decisions that have found common-law claims squarely preempted (on the strength of *Wolens*) have all been mistaken. Fortunately, this Court and the lower courts were not wrong all along. Both the text and purpose of the ADA squarely support applying it to state enforcement of common-law standards that relate to prices, routes, or services.

In the end, it is no surprise that Respondent's arguments are foreclosed by *Wolens* and this Court's other precedents. Respondent prevailed below only by virtue of Ninth Circuit precedents that have been widely recognized as inconsistent with this Court's

jurisprudence. Under this Court's precedents, there are only two relevant questions: Does Respondent's claim relate to prices, routes, or services, and does it enforce state law. *Wolens* made clear that claims concerning frequent flyer programs relate to price and service claims. And the very nature of Respondent's implied covenant claim makes plain that he seeks to enforce something other than the parties' express voluntary undertakings, since he tried and failed to prevail on the contract as written. This Court should bring the Ninth Circuit back into the fold and make clear that implied covenant claims relating to prices, routes, or services are preempted.

ARGUMENT

I. Respondent's Claim Is "Related To" Petitioners' Prices And Services.

Wolens held that airline frequent flyer programs relate to prices and services. *See* 513 U.S. at 226. Indeed, the Court did not find the question difficult. *Id.*

Undeterred, Respondent contends that what was true of American's program in *Wolens* is somehow not true of Northwest's program here. That argument is a non-starter. The *Wolens* plaintiffs complained that retroactive changes to American's program deprived them of their full "mileage credits for free tickets and upgrades" and limited their ability to take advantage of the program. The Court found it obvious that the claims related to prices (how much plaintiffs would pay for flights) and services ("*i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates"). *Id.*

Respondent's claims are indistinguishable. Indeed, he claims that his access to cheaper flights and program services was not just impaired, but eliminated altogether. *See* J.A. 49 (alleging that petitioners' revocation of his Platinum Elite status caused him to lose "valuable Program benefits ... including, but not limited to, flight upgrades, accumulated mileage, ... [and] benefits on other airlines"). *Wolens* thus controls the "relates to" question.

Respondent gamely suggests that changes in the nature of frequent flyer programs since *Wolens* somehow alter the calculus. But no amount of credit-card partnerships or ability to redeem miles for Broadway tickets changes the basic nature of Respondent's claim. If Respondent's beef was with a theater over the location of seats purchased with miles or with a credit-card company for the number of miles associated with purchases, it would be another matter. But Respondent's beef is with an airline for exercising the airline's contractual right to terminate his membership in its frequent flyer program with the attendant consequence that he lost his claim to free flights and access to the program's services. That claim relates to prices and services in the precise same way as the claims in *Wolens*. Indeed, Respondent is not someone who claims to have accumulated his miles from unrelated credit-card purchases or to want to use them for unrelated purchases. He complains that he went out of his way to fly Northwest, obtained elite status, and then was deprived of access to upgrades and free flights, not theater tickets. *See* J.A. 34 (alleging that Respondent achieved elite Status because he "travels

extensively," and that Respondent and his wife "readily qualif[y] as 'frequent fliers'").

Ignoring the obviously controlling holding of *Wolens*, Respondent cobbles together selective quotes from other ADA and FAAAA preemption decisions to suggest that a claim relates to prices, routes, or services only when it "directly regulates," "expressly references," or "has a forbidden significant effect" on an airline's prices, routes, or services. Resp. Br. 41 (citations, brackets, and quotation marks omitted). But, of course, this Court has taken a far broader view of the "'deliberately expansive'" language in the ADA's preemption provision, *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992), including in *Wolens*. *See* Pet'r Br. 17. Indeed, Respondent's argument is little more than a reprise of the Illinois Supreme Court's reasoning rejected in *Wolens* to the effect that "relates to" only captures "'essential'" services. *See* 513 U.S. at 226.

Respondent alleges (at 43) that the "absence of DOT regulations related to frequent flyer program contracts or membership" somehow underscores the purported disconnect between his claim and petitioners' services and prices. And he notes that DOT instead advises consumers to consider legal action if they are dissatisfied with the administration of the frequent flyer program. But the absence of DOT regulation of the details of frequent flyer programs is simply a reflection of Congress' deregulatory intent in passing the Airline *Deregulation* Act. And the very fact that DOT, as opposed to the Commerce Department or the FTC's Bureau of Consumer Protection, provides advice on

frequent flyer programs (and suggests flyers consider pursuing contract claims preserved by *Wolens*) underscores the relationship between frequent flyer programs and airline prices and services. Indeed, DOT indisputably has the authority to police unfair or deceptive practices regarding frequent flyer programs. *See* Pet'r Br. 38-40; U.S. Br. 21-22.

II. Respondent's Claim Seeks To Enlarge The Parties' Voluntary Agreement By Enforcing State Policies External To The Agreement, And Thus Falls Outside The *Wolens* Exception For Routine Breach-Of-Contract Claims.

Respondent concedes that "some scholars and courts" have described the implied covenant of good faith and fair dealing as imposing "external notions of fairness," and that "some plaintiffs" alleging implied covenant claims have "looked to external state or federal policies instead of to the contracts' purpose and parties' expectations." Resp. Br. 15. Respondent insists, however, that *his* implied covenant claim is different; it purportedly "seeks to construe the agreement into which the parties voluntarily entered, by looking not only to the express terms of the contract but also to the terms that are implied in it." *Id.* at 16.

Respondent's concession that some implied covenant claims by some litigants are preempted is significant for two reasons. First, it makes clear that Respondent is abandoning the Ninth Circuit's reasoning in the decision below. The Ninth Circuit concluded that all implied covenant claims were categorically precluded based on reasoning that

cannot be squared with this Court's precedents. *See* Pet'r Br. 12-14. Respondent wisely declines to defend that holding.

Second, Respondent's concession that some courts look to "external notions of fairness" in adjudicating implied covenant claims is an admission that adopting his view will guarantee the patchwork of results that the ADA's preemption clause is designed to avoid. Some states candidly admit that they impose their own "external notions" on the parties, while others disclaim such efforts while still ensuring that "reasonable expectations" based on "community standards" are protected. Worse still, as Respondent admits, some litigants even in states that disclaim resort to external policies nonetheless seek to impose them, and courts would have precious few tools to sort through what kind of implied covenant claim is really at issue. Respondent glibly dismisses other implied covenant claims as ones looking to external policies, Resp. Br. 15 (citing *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36 (1st Cir. 2007)), without ever explaining how they are different.

In reality, the far better approach is to recognize, consistent with *Wolens*, that once a litigant looks beyond the express terms of the parties' voluntary undertakings, he is seeking to enlarge the parties' bargain and is enforcing state law relating to prices, routes, or services. That is certainly the case here. Having brought his breach-of-contract claim and failed on the merits, Respondent's effort to enforce Minnesota law regarding the implied covenant to enhance that bargain is preempted.

A. Respondent's Implied Covenant Claim Is Clearly Preempted.

As the district court concluded, the "parties' bargain" here, *Wolens*, 513 U.S. at 233, could not be more clear. Respondent entered into the WorldPerks agreement with Northwest, which promised Respondent numerous benefits but also expressly stated that Northwest could remove any member for abuse of the program, including "improper conduct as determined by Northwest in its sole judgment." Northwest subsequently exercised its contractual right to remove Respondent after concluding that he had abused the program in numerous ways. The district court correctly held on the merits that given the agreement's straightforward language—*i.e.*, the "term[s] [Northwest] itself stipulated," *id.* at 232-33—Northwest did not breach the agreement, and Respondent did not challenge that ruling on appeal.

Respondent's failure to appeal that breach-of-contract ruling is significant not because it is some sort of forfeiture or procedural default, but because his own pleading and litigation tactics demonstrate the difference between the parties' voluntary undertakings (embodied in the breach-of-contract claim) and Respondent's effort to enlarge that bargain based on state law (the implied covenant claim). Respondent suggests his case is like *Wolens* because American Airlines invoked implied covenant arguments in its reply brief there. But *Wolens* dismissed American's efforts as "assum[ing] the answer to the very contract construction" question at issue and emphasized that this "question of contract interpretation has not yet had a full airing." *Id.* at

234. Here, by contrast, Respondent's breach-of-contract claim has very much received a full airing. It was fully litigated, and respondent lost on the merits. The separate implied covenant claim does not assume the answer to the breach-of-contract claim; it offers a state-law theory for why Respondent wins even though he lost his breach-of-contract claim. As Respondent's own authorities observe, the "obvious reason to plead an implied-covenant claim in addition to a breach-of-contract claim" is that "the claimant may not prevail on the breach-of-contract claim." *Columbia Cas. Co. v. 3M Co.*, 814 N.W.2d 33, 38 (Minn. Ct. App. 2012).

What Respondent's separate implied covenant claim plainly seeks is an "enlargement or enhancement" of the agreement. *Wolens*, 513 U.S. at 233. Whereas the agreement unambiguously allows Northwest to remove individuals who have abused the program, Respondent would engraft additional requirements onto the agreement, including that Northwest may exercise its unfettered contractual right only if there is "valid cause" and an adequate explanation. *See, e.g.*, J.A. 46-47, 52. In other words, the agreement itself gives Northwest complete discretion; Respondent's implied covenant claim would impose a series of procedural and substantive constraints on that discretion. It is hard to imagine a more blatant example of enlarging or enhancing the parties' bargain. *See* U.S. Br. 19-20 (stating that Respondent invokes the implied covenant to "trump the terms of the contract").

That "enlargement or enhancement," moreover, would indisputably be accomplished by "state laws or

policies external to the agreement." *Wolens*, 513 U.S. at 233. As the district court aptly put it, the implied covenant of good faith and fair dealing "does not appear *ex nihilo*, and is not imposed by the contract itself." Pet. App. 65 (footnote omitted). Rather, it is "implied *by state law*." *Id.* (emphasis added). It is no answer to suggest that the implied covenant simply ascertains the reasonable expectations of the parties based on the express terms of the contract. It is still state law that dictates what expectations are reasonable and which contracts are subject to implied covenants.

That is particularly clear under the law of Minnesota. Respondent's implied covenant claim alleges that in exercising its contractual right to remove him for abuse, Northwest did not act "consistent with [his] reasonable expectations" or apply the Agreement "in a reasonable manner." J.A. 51. Under Minnesota law, as in many states, a judge or jury would determine the nature of Respondent's "reasonable expectations," and whether Northwest acted "reasonably," by reference to "community standards of decency, fairness or reasonableness." Restatement (Second) of Contracts § 205 cmt. a (1981); *e.g.*, *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502-03 (Minn. 1995); *Hanson Constr. & Specialty Cabinets, LLC v. Worlein*, 2006 WL 2807018, at *4 (Minn. Ct. App. Oct. 3, 2006); Pet'r Br. 24-25. The very source of those standards—the "community"—underscores that the covenant reflects not the parties' "own, self-imposed undertakings" but "policies external to the agreement." *Wolens*, 513 U.S. at 228, 233; *see also* U.S. Br. 30 (stating that "applications of the implied-

covenant doctrine seeking to enforce 'fundamental notions of fairness' or 'community standards' external to the contract are preempted by the ADA").[1]

B. Implied Covenant Claims More Broadly Seek to Enforce State Law Rather than the Parties' Voluntary Undertakings.

There is no question that Respondent's own implied covenant claim is an effort to use state law to enlarge the parties' agreement. As the United States contends, that conclusion is sufficient to reverse the decision below and reject the Ninth Circuit's misguided ruling that implied covenant claims are categorically unpreempted. But although the way in which Respondent's claims were litigated makes preemption particularly plain here, this Court should provide guidance to the lower courts by making clear that implied covenant claims—like unconscionability arguments—seek to enlarge the parties' bargain based on state law external to the agreement. To use Respondent's own dichotomy, what escapes preemption under *Wolens* is the terms of the parties' express agreement, not any additional terms implied by state courts applying state law.

Implied covenant claims inherently seek to go beyond express voluntary undertakings. Even the cases Respondent invokes in his attempt to minimize the role of state law acknowledge that the covenant of good faith and fair dealing is "read into contracts."

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[1] Even Respondent's *amicus*, who disagrees with the Restatement standard, *see* Burton Br. 10 n.3, has acknowledged that it "implies a ground for judicial decision that lies outside of and may take precedence over the agreement of the parties." *See* Pet'r Br. 26 (quotation marks omitted).

Resp. Br. 14-15 (quoting *Foley v. Interactive Data Corp.*, 765 P.2d 373, 394 (Cal. 1988)). And the "reading in" is done by state judges and juries interpreting and applying state law.

The existence of the covenant with respect to any contract is the result of a conscious decision by a state's judiciary to read the covenant into that type of agreement, a point underscored by other States' decisions not to "read" the implied covenant into every contract. *See, e.g.*, *City of Midland v. O'Bryant*, 18 S.W.3d 209, 215 (Tex. 2000) ("We have specifically rejected the implication of a general duty of good faith and fair dealing in all contracts." (quotation marks omitted)); Pet'r Br. 33-34 (citing cases rejecting implied-covenant challenges to at-will employment agreements).[2] So while, for example, the covenant may be implied into the WorldPerks Agreement under Minnesota law, that simply reflects that state's policy choice with respect to that type of contract. And as a result of that policy choice, the covenant constitutes a "'binding standard[] of conduct that operate[s] irrespective of [the] private agreement'" between Respondent and Northwest. *Wolens*, 513 U.S. at 229 n.5. In this respect, implied covenant claims are materially indistinguishable

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[2] Respondent has no real response to the at-will employment cases except to assert that employment is a "special context" in which "many states do not apply the covenant at all." Resp. Br. 28 n.5. But it is state judges in some States, but not others, who decided that the at-will employment context is "special." Thus, the at-will cases underscore that implied covenant claims involve both the imposition of state law external to the agreement and the risk of non-uniform results. *See* Pet'r Br. 33-35.

from claims alleging unconscionability, which as Respondent concedes also "involves the imposition of external policies." Resp. Br. 17.[3]

State law and policy determine not only whether the covenant *exists* with respect to a particular contract, but also *how* the covenant would affect the parties' agreement. Again, Respondent's claim confirms this point and demonstrates not just the infirmity of his own case but also why implied-covenant claims in general are preempted under the logic of *Wolens*. Respondent asserts that some implied-covenant claims escape preemption because they seek to ascertain "the scope of the parties' voluntary undertakings in light of the parties' purposes and reasonable expectations." Resp. Br. 19. As an example, he cites his own complaint, which alleges that "'the good faith requirement precludes an action by the defendants that would contravene the reasonable expectations of the plaintiff and Class members.'" *Id.* at 16 (citing J.A. 51). But the determination of *what* it was reasonable for Respondent—or any plaintiff—to expect and *whether* the conduct of Northwest—or any defendant—"contravene[d]" those expectations would be determined by a judge and jury applying "community standards" of fairness, decency, morality, or reasonableness—in short, "view[s] of fairness, equity, or other policy considerations external to an air carrier's actual undertakings." U.S. Br. 20.

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[3] Respondent does not dispute that where it is applicable, the covenant generally cannot be waived, underscoring that like the unconscionability doctrine, it operates "irrespective of any private agreement." *See* Cargo Airline Ass'n Br. 12-13.

Indeed, even Respondent's own authorities acknowledge that determinations of parties' "reasonable expectations" "rely directly upon considerations of morality and public policy." *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.); *see also* E. Allan Farnsworth, *Good Faith Performance & Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 671 (1963) (stating that "good faith performance" is measured "based on the decency, fairness or reasonableness of the community ... of which one is a member"). Most (but not Respondent, *see* Part III, *infra*) would concede that the ADA preempts a negligence claim relating to prices, routes, or services, because allowing a jury to determine the reasonableness of an airline's conduct relating to those subjects is antithetical to the ADA's intent. Congress did not deregulate at the federal level only to have state-court juries fill the gap by adjudicating the reasonableness of airline conduct. But allowing a jury to adjudicate reasonableness in considering an implied covenant claim is no different. Whether for purposes of a negligence or an implied covenant claim, a jury applying state-law reasonableness requirements based on community standards is enforcing state law, not the parties' voluntary undertakings.

For good reason, then, so far as petitioners are aware, *every* court to address the question—except for the Ninth Circuit below—has held that the ADA preempts implied-covenant claims that relate to an airline's prices, routes, or services. *See, e.g.*, *Benedetto v. Delta Air Lines, Inc.*, 917 F. Supp. 2d 976, 983-84 & n.5 (D.S.D. 2013) (observing that "a

good faith claim will require application of state law in such a manner to incorporate state public policies"); *A.I.B. Express, Inc. v. FedEx Corp.*, 358 F. Supp. 2d 239, 253 (S.D.N.Y. 2004) (preempting claim "because it seeks to add to the terms of [defendant's] contractual obligations"); *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901, 905 (Wash. Ct. App. 2000) (stating that plaintiffs "do not seek to enforce the contract according to its terms" but "are attempting to enlarge or enhance their agreements with [defendant] based on the laws or policies of this state that are external to the agreements").[4] Respondent does not cite a single case holding otherwise.

Respondent cites several authorities for the proposition that in some circumstances, some states have expressed a willingness to apply the implied covenant to limit the absolute discretion a contract confers on one of the parties, lest a contract be found

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[4] *Accord Buck*, 476 F.3d at 36; *Newman v. Spirit Airlines, Inc.*, 2012 WL 3134422, at *4 (N.D. Ill. July 27, 2012); *Joseph v. JetBlue Airways Corp.*, 2012 WL 1204070, at *6 (N.D.N.Y. Apr. 11, 2012); *Schultz v. United Airlines, Inc.*, 797 F. Supp. 2d 1103, 1107 (W.D. Wash. 2011); *ATA Airlines, Inc. v. Fed. Express Corp.*, 2010 WL 1754164, at *4 (S.D. Ind. Apr. 21, 2010); *DHL Express (USA), Inc. v. Express Save Indus., Inc.*, 2009 WL 4110806, at *6 (S.D. Fla. Nov. 24, 2009); *Samica Enters., LLC v. Mail Boxes Etc. USA, Inc.*, 637 F. Supp. 2d 712, 720 (C.D. Cal. 2008); *McMullen v. Delta Air Lines, Inc.*, 2008 WL 4449587, at *5 (N.D. Cal. Sept. 30, 2008); *Hanni v. Am. Airlines, Inc.*, 2008 WL 1885794, at *7 (N.D. Cal. Apr. 25, 2008); *Feldman v. United Parcel Serv., Inc.*, 2008 WL 800989, at *17-18 (S.D.N.Y. Mar. 24, 2008); *Power Standards Lab, Inc. v. Fed. Express Corp.*, 127 Cal. App. 4th 1039, 1046 (Ct. App. 2005); *Blackner v. Cont'l Airlines, Inc.*, 709 A.2d 258, 260 (N.J. Super. Ct. App. Div. 1998).

"illusory." Resp. Br. 18-20. But that argument is doubly flawed.

First, Respondent cites no cases for the dubious proposition that a frequent flyer agreement is the type of contract that is rendered illusory if a contractually conferred grant of discretion is not cabined. After all, a frequent flyer program provides gratuitous bonuses to customers to reward their loyalty. The members have already received full, non-illusory performance for any consideration paid for the underlying flights.

Second, as Respondent's own authorities demonstrate, the threshold determination of whether a contract would be rendered "illusory" is a state-law question, and any such limitations on contractually conferred discretion would derive from community standards of morality, decency, fairness, or reasonableness, *i.e.*, "state laws or policies external to the agreement." *Wolens*, 513 U.S. at 233.[5] And even then, many states emphatically do *not* permit the implied covenant to cabin one party's absolute

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[5] For example, in *White Stone Partners, LP v. Piper Jaffray Cos.*, 978 F. Supp. 878, 881-82 (D. Minn. 1997), the federal court predicted that the Minnesota Supreme Court would apply the implied covenant to cabin contractual grants of unfettered discretion. Even assuming that *Erie* prediction was correct (the Minnesota Supreme Court has never addressed the question), Minnesota courts would employ the Restatement's "community standards" rubric when applying the implied covenant. *See* pp. 10-11, *supra*. And in *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 193-94 (N.H. 1989) (Souter, J.), the court held that *whether* the "defendant's exercise of discretion exceeded the limits of reasonableness" required an application of "community standards of honesty, decency and reasonableness."

discretion, particularly where, as here, the terms of the contract are unambiguous. *See* Pet'r Br. 32-33; U.S. Br. 26 & n.7.[6]

The problem with state-law interference with airlines' exercise of contractually-reserved discretion is well-illustrated by an airline's comparable reservation in its contract of carriage to refuse to transport (or continue to transport) a passenger when refusal "is reasonably necessary in [its] sole discretion" for the safety of others or the aircraft. *E.g.*, Delta Domestic General Rules Tariff, R. 35 § F (Aug. 1, 2013), http://tinyurl.com/deltacontract (petitioner Delta's contract of carriage). The prospect of a state-court jury evaluating the extent to which the airline's removal decision frustrated the unruly passenger's "reasonable expectations" is not a happy one. For good reason, then, the United States correctly observes that it would be "wholly inconsistent with Congress's deregulatory purposes to allow claims based on *any* theory under state contract law that would cabin discretionary decisions that air carriers have expressly reserved to themselves concerning prices, routes, or services." U.S. Br. 20-21 (emphasis added).

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[6] These cases do not turn on the purportedly distinguishing characteristics Respondent asserts (at 28); their holdings are categorical. *See, e.g.*, *Shoney's LLC v. MAC East, LLC*, 27 So.3d 1216, 1223 (Ala. 2009) (rejecting reliance on implied covenant because "an unqualified express standard such as 'sole discretion' is ... to be construed as written").

C. The Policies Underlying ADA Preemption Strongly Favor Preemption Here.

Respondent's contention (at 25-29) that the ability to bring implied-covenant claims relating to an airline's prices, routes, or services "furthers the ADA's goal[s]" gets matters backwards. Permitting implied-covenant claims to proceed would open the door to a deluge of fairness-based challenges to contractual terms and the exercise of contractually-conferred discretion, all contrary to the intent of those agreements to promote certainty, efficiency, and reliability. *See* Chamber Br. 14-23; *e.g.*, *Samica Enters.*, 637 F. Supp. 2d at 720 (preempting challenge to "unreasonable" price modifications where agreement "gave [defendant] the discretion to modify those prices"); *Howell*, 994 P.2d at 905 (preempting challenge to airline's refusal to refund nonrefundable ticket where contract "authorized the airline" to refuse). The "stability and efficiency of the market," *Wolens*, 513 U.S. at 230, is hardly enhanced when a carrier cannot "know ahead of time whether a particular exercise of its expressly reserved contractual discretion would be found 'unreasonable' or 'unfair.'" Chamber Br. 11. And that is just in the domestic sphere; Respondent has no answer to the instability such claims would wreak on international carriage. *See* IATA Br. 16-18.[7]

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[7] Respondent's suggestion (at 26) that implied-covenant claims would "reduc[e] the costs of contracting" and decrease the need for "overelaborate disclaimers" is implausible. If incontrovertibly clear language like that in the WorldPerks Agreement is not sufficient to describe the parties' rights, then

Likewise, Respondent has no real answer to the fact that DOT, the ADA's "experienced administrator," *Wolens*, 513 U.S. at 827, indisputably has the authority to investigate and determine whether an airline has engaged in unfair practices (including with respect to frequent flyer programs), it has exercised such authority, and it has promulgated regulations concerning aspects of frequent flyer programs not implicated here. *See* Pet'r Br. 38-40; U.S. Br. 21-22. As the United States correctly observes, "[i]t would be inconsistent with that regulatory scheme, and the ADA's larger deregulatory purpose, for courts to apply contract principles 'based on state laws or policies external to the agreement'" like the implied covenant—particularly where, as here, "DOT has chosen not to directly regulate [this aspect of] frequent-flyer programs." U.S. Br. 22.

Respondent acknowledges that there are "some differences in how states apply the covenant of good faith" but nevertheless contends that that the implied covenant "is a principle at the 'core' of contract law" and therefore there is "no large risk of nonuniform adjudication" of claims asserting a breach of the implied covenant. Resp. 26-27 (quoting *Wolens*, 513 U.S. at 233 n.8). But Respondent's own concession that some implied covenant claims avowedly seek to impose "external policies" while others purport only to protect "reasonable expectations" highlights the patchwork that his

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additional, "overelaborate disclaimers" would almost certainly be necessary—if such disclaimers are even permissible. *See* n.3, *supra*.

argument invites. Beyond that, whether a particular state even implies the covenant into a specific contract is far from uniform. And even in states that agree that the implied covenant protects "reasonable expectations" based on "community standards," the amorphous nature of those standards all but guarantees nonuniform results. Suppose, for example, that pursuant to the conferral of unfettered discretion provided in its contract of carriage, petitioner Delta refused to transport a passenger it believed to be intoxicated. A jury in one state, applying its own views of fairness and decency, might conclude that Delta's conduct was not reasonable, but rather pretextual (as Respondent claims here). By contrast, a jury in another state, applying those same amorphous standards, might conclude that Delta's conduct was eminently reasonable. The ADA was enacted to prevent such non-uniform regulation-by-jury-verdict filling the gap created by federal deregulation.

III. Respondent's Belated Argument That The ADA Does Not Expressly Preempt Any Common-Law Claims Is Meritless.

In a last-ditch attempt to salvage the Ninth Circuit's judgment, Respondent argues that the ADA does not preempt *any* common-law claims. Not one court has accepted this far-reaching contention. This Court should not be the first.

1. This Court should not address this issue because it was neither raised by Respondent below nor addressed by either the district court or the Ninth Circuit. "[T]his Court will affirm on grounds that have not been raised below only in exceptional

cases." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989)) (quotation marks omitted). This is by no means an "exceptional case[]." *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 (2002) (declining to address respondent's argument "not raised below"); *Nordberg*, 309 U.S. at 39 (same); *Heckler v. Campbell*, 461 U.S. 458, 469 (1983) (same). Indeed, that reluctance should apply with special force when the unargued theory sweeps far more broadly than the reasoning of the decision below and would undermine well-settled jurisprudence in other circuits.

2. While not raised below, Respondent's eleventh-hour argument was raised and rejected by the First Circuit in *Brown v. United Airlines, Inc.*, 720 F.3d 60 (1st Cir. 2013), and anticipated by the brief of *amici curiae* Airlines for America ("A4A") and American Trucking Associations, Inc. *Brown* and the A4A brief thoroughly demonstrate the flaws in Respondent's belated argument, and yet Respondent simply ignores them. Thus, if this Court is inclined to address it, this Court need not dwell long before rejecting Respondent's sweeping and meritless theory.

The first problem with Respondent's argument is that it is inconsistent with the reasoning of *Wolens* and the holdings of countless lower court cases finding common-law claims—from fraud to negligence to intentional infliction of emotional distress—preempted by the ADA. If Respondent's argument is to be credited, this Court's careful analysis of how contract claims related to prices and

services but did not enforce state law was all a fool's errand. The Court should have simply noted that contract claims are non-statutory and moved on.

The broader problem with Respondent's argument is that it ignores a critical difference between the text of the ADA and the statutory language at issue in the case on which Respondent primarily bases his sweeping theory, *Sprietsma*. There, the Court held that a provision preempting a "law or regulation" did not preempt common-law tort actions. 537 U.S. at 62-64. But the ADA also preempts "other provision[s] having the force and effect of law," which every court to address the question has concluded is "elastic enough to encompass common law." *Brown*, 720 F.3d at 67; A4A Br. 6-7 & n.2.

Respondent implausibly suggests (at 31) that the expansive phrase "other provision having the force and effect of law" covers only the minuscule category of "positively enacted promulgated requirement[s] with the force and effect of law ... not denominated a statute or regulation." But "it is hard to imagine" that in drafting the ADA's broad preemption clause, Congress "would have focused on such relatively obscure possibilities while ignoring common law," especially when common-law claims pose a massive risk of frustrating Congress' deregulatory intent. *Brown*, 720 F.3d at 69 n.5.

American Trucking Ass'n v. City of Los Angeles, 133 S. Ct. 2096 (2013), does not aid Respondent. There, the Court held that the contractual arrangements in question were preempted because they implicated the government's "exercise of

regulatory authority," which "counts as action 'having the force and effect of law.'" *Id.* at 2102-03. But as the Court has long recognized, common-law doctrines also implicate the state's "exercise of regulatory authority," and do so much more dramatically and consistently than provisions in government contracts. *See, e.g.*, *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1269 (2012) (observing that "state regulation can be effectively exerted through an award of damages, and the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy" (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (brackets, ellipsis, and quotation marks omitted))); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 522 (1992) (plurality opinion); *see also Brown*, 720 F.3d at 65.[8]

3. The history of the ADA's preemption clause—from which Congress removed the words "rule" and "standard" in 1994 without intending any substantive change, *see* Pet'r Br. 3-4 & n.1—further repudiates Respondent's argument. Before 1994, not one court held that common-law claims were categorically removed from the ADA's purview, and many courts found common-law claims preempted, a unanimity Congress is presumed to have left

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[8] *Morales* and A4A thoroughly refute Respondent's passing contention (at 31-32) that the savings clause of the Federal Aviation Act of 1958 permits *all* common-law claims to proceed. *See Morales*, 504 U.S. at 385 (characterizing savings clause as "a relic of the pre-ADA/no pre-emption regime" that "cannot be allowed to supersede the specific substantive pre-emption provision"); A4A Br. 13-16 & n.4.

undisturbed when it recodified the provision without substantive effect. *See* A4A Br. 11-13. And since 1994, not one court has held that the ADA does not preempt any common-law claims, and courts have found a wide variety of common-law claims preempted. *See id.* at 18-19.

Respondent concedes (at 33) that "standard" in the pre-1994 text could refer to common-law standards and that this Court has construed "similar" language in the Federal Railroad Safety Act's preemption provision to extend to common-law claims in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). But Respondent has an answer: the FRSA, and not the ADA, includes "orders" as well as "rules" and "standards." There are two problems with that argument. First, it was the "broad phrases" of the FRSA—and not the word "order"—that *CSX* held to preempt common law. *Id.* at 664. Second, and more important, the notion that Congress would defeat its manifest deregulatory intent and allow common-law juries to fill the gap created by federal deregulation through the remarkably subtle stratagem of omitting the word "order" from an otherwise broadly-worded preemption provision strains all credulity. Congress understood its deregulatory intent could be just as thoroughly undermined by state-court juries wielding reasonableness tests as by state regulators with their own notion of what is just and reasonable. This Court should conclude that common-law claims seeking to enforce state law relating to prices, routes, or services, including Respondent's implied covenant claim, are preempted by the ADA.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

The Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, provides, with certain exceptions, that "a State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). The question presented is whether that provision preempts respondent's claim that petitioner's termination of his membership status in petitioner's frequent-flyer program violated an implied covenant of good faith and fair dealing, which arises under the state common law of contract.

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INTEREST OF THE UNITED STATES

The issue in this case is whether 49 U.S.C. 41713(b)(1), a provision of the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, preempts a state-law claim asserting that termination of membership status in an airline's frequent-flyer program violated an implied covenant of good faith and fair dealing under state contract law. Congress enacted the preemption provision to prevent States from undermining federal deregulation of the airline industry and to promote the ADA's goal of fostering "maximum reliance on competitive market forces." 49 U.S.C. 40101(a)(6). The United States has an interest in ensuring that the provision is interpreted and applied in a manner that vindicates the market-oriented purposes of the statute by protecting the

enforceability of privately ordered obligations through the state common law of contract, while preventing States from imposing substantive policies that override the bargained-for choices of contracting parties.

STATEMENT

The ADA preempts any state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). Construing that provision, this Court has held that "the ADA permits state-law-based court adjudication of routine breach-of-contract claims." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 232 (1995). Respondent sued petitioner, claiming, *inter alia*, that petitioner's termination of respondent's membership status in petitioner's frequent-flyer program breached an implied covenant of good faith and fair dealing based on state contract law. Pet. App. 58. The district court granted petitioner's motion to dismiss, holding that the ADA preempts respondent's implied-covenant claim. *Id.* at 61-69. The court of appeals reversed, concluding that the ADA does not preempt "state contract remedies," *id.* at 15, and that respondent's implied-covenant claim does not "relate to" petitioner's prices or services, *id.* at 17-19.

1. a. Before 1978, the federal government extensively regulated air carriers by controlling entry into the industry, the rates an air carrier could charge its customers, the services it could offer, and the routes it could fly. See, *e.g.*, *Western Air Lines, Inc.* v. *Civil Aeronautics Bd.*, 347 U.S. 67 (1954); Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731. The federal government's regulatory authority was not exclusive, and the States also regulated air carriers. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S.

374, 378 (1992). In enacting the ADA in 1978, Congress largely deregulated the airline industry, concluding that "'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services.'" *Ibid.* (brackets in original) (quoting 49 U.S.C. App. 1302(a)(4) and (9) (1988)) (codified as amended at 49 U.S.C. 40101(a)(6) and (12)). "To ensure that the States would not undo federal deregulation with regulation of their own," *ibid.*, the ADA included a preemption provision, barring any State from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier," 49 U.S.C. 41713(b)(1).[1]

b. In *Wolens*, this Court considered that preemption provision in the context of a state-law challenge to an airline's "retroactive changes in terms and conditions" of a frequent-flyer program. 513 U.S. at 222. Participants in the program claimed that the airline's changes violated a state consumer-fraud act and, separately, constituted a breach of contract. *Id.* at 225. The state supreme court had held that the ADA did not preempt plaintiffs' challenges because a frequent-flyer program is not "essential" to the "operation of an airline." *Id.* at 226 (quoting *Wolens* v. *American Airlines, Inc.*, 626 N.E.2d 205, 208 (Ill.

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[1] As originally enacted, the provision preempted any state "law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." ADA § 4(a), 92 Stat. 1708. When adopting the current language, Congress explained that it intended the revision to be "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994); see § 1(d), 108 Stat. 1143.

1993)). Accordingly, the state court had concluded that the plaintiffs had not asserted claims "relat[ed] to" the air carrier's rates, routes, or services within the meaning of the preemption provision. *Ibid.* (brackets in original) (quoting *Wolens*, 626 N.E.2d at 208).

This Court affirmed in part and reversed in part. *Wolens*, 513 U.S. at 235. The Court explained that it "need not dwell on the question whether plaintiffs' complaints state claims 'relating to [air carrier] rates, routes, or services.'" *Id.* at 226 (brackets in original). Their claims related to "rates" because they involved the airline's "charges in the form of mileage credits for free tickets and upgrades." *Ibid.* The claims related to "services" because they concerned "access to flights and class-of-service upgrades unlimited by retrospectively applied" terms limiting that access. *Ibid.*

Although the plaintiffs' claims were related to the rates, routes, or services of an air carrier, the Court explained, the ADA preempted those claims only if they sought to "enforce any [state] law." *Wolens*, 513 U.S. at 226. The Court determined that the plaintiffs' claims based on the state consumer-fraud statute did seek to enforce a state law within the meaning of the preemption provision. *Id.* at 227. The state statute "[was] prescriptive; it control[led] the primary conduct of those falling within its governance"; and it "serve[d] as a means to guide and police the marketing practices of the airlines." *Id.* at 227-228. Accordingly, the statute "typified" state legislation having "the potential for intrusive regulation of airline business practices" of the sort Congress intended to fore-

close through the ADA, and so it was preempted by the federal statute. *Id.* at 227; see *id.* at 228.

The Court held, by contrast, that the plaintiffs' contract claims were not preempted because they "alleg[ed] no violation of state-imposed obligations, but [sought] recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Wolens*, 513 U.S. at 228. The ADA's preemption provision bars a State from "enact[ing] or enforc[ing]" certain "law[s], regulation[s], or other provision[s] having the force and effect of law." 49 U.S.C. 41713(b)(1). Those terms, the Court reasoned, "connote[] official, government-imposed policies" and "binding standards of conduct that operate irrespective of any private agreement." *Wolens*, 513 U.S. at 229 n.5 (quoting U.S. Amicus Br. at 16 (No. 93-1286)). Because "[a] remedy confined to a contract's terms simply holds parties to their agreements," *id.* at 229, the Court held that "the ADA permits state-law-based court adjudication of routine breach-of-contract claims," *id.* at 232. That understanding, the Court continued, was buttressed by Congress's retention of a saving clause, which preserved "the remedies now existing at common law or by statute." *Id.* at 232 (quoting 49 U.S.C. App. 1506 (1988)) (codified as amended at 49 U.S.C. 40120(c)).

2. a. Petitioner maintained a frequent-flyer program. Respondent was a member of that program between 1999 and 2008. Pet. App. 56-57. A clause in the contract between petitioner and program members provided: "Abuse of the [frequent-flyer] program (including * * * improper conduct as determined by [petitioner] in its sole judgment * * *) may result in cancellation of the member's account."

J.A. 64-65. In June 2008, petitioner notified respondent that it had terminated his "Platinum Elite" status in the program. Pet. App. 57. When respondent asked for an explanation, petitioner invoked the clause quoted above. *Id.* at 58.

Respondent filed a putative class action against petitioner, alleging that it had improperly determined that he had abused the frequent-flyer program, J.A. 39-44, and that petitioner's termination of his status "was nothing more than a pretext for cost-cutting in advance of" a merger with another airline, J.A. 45. Respondent asserted four claims: breach of contract, breach of an implied covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation. Pet. App. 58-59.

The district court granted petitioner's motion to dismiss. Pet. App. 56-73. The court held that respondent's claims for breach of an implied covenant, negligent misrepresentation, and intentional misrepresentation were preempted by the ADA. *Id.* at 61-69. Those claims, the court reasoned, sought to enforce state law, *id.* at 62-67, and related to an air carrier's prices and services, *id.* at 67-69. With respect to respondent's implied-covenant claim, the district court explained that the duty allegedly imposed "does not appear *ex nihilo*, and is not imposed by the contract itself (unless it so stipulates). Rather, it is implied by state law." *Id.* at 65 (footnote omitted). The district court dismissed without prejudice respondent's breach-of-contract claim, concluding that the language of the contract left the determination of valid cause for termination to petitioner's "sole judgment." *Id.* at 71-72; see *id.* at 72 ("[Respondent] in effect asks that the Court replace [petitioner's] judgment with his own

regarding what counts as 'abuse' of [the frequent-flyer program].").[2]

b. Respondent appealed, challenging only the district court's dismissal of his claim for breach of an implied covenant. Pet. App. 5. The court of appeals reversed, holding that the ADA does not preempt such a claim. *Id.* at 3.[3]

First, the court of appeals held that an implied covenant of good faith and fair dealing was not the sort of state law preempted by the ADA. Pet. App. 8-17. The court observed that, in *Wolens*, this Court "drew a clear distinction * * * between state laws that regulate airlines and state enforcement of contract disputes." *Id.* at 10. The court's own precedent had held that the ADA's saving clause preserved "state tort remedies that already existed at common law, provid[ed] that such remedies do not significantly impact federal deregulation." *Id.* at 15 (quoting *Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998)). In the court's view, that reasoning applied equally to existing state common-law-contract remedies, such as the implied covenant of good faith and fair dealing. *Ibid.* The court held that allowing respondent's implied-covenant claim to proceed would not "interfere with the deregulatory mandate" of the ADA but would, instead, enforce petitioner's "contractual obligations." *Id.* at 15-16. Accordingly, respondent's implied-covenant claim did not seek to enforce state law within the meaning of the ADA. *Id.* at 16-17.

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[2] The district court denied respondent's motion for reconsideration. Pet. App. 41-55.

[3] The court of appeals withdrew an initial opinion. Pet. App. 2; see *id.* at 20-40.

The court of appeals further held that respondent's implied-covenant claim does not relate to the prices or services of an air carrier. Pet. App. 17-19. It believed that this Court had construed the ADA's preemption provision "narrow[ly]." *Id.* at 9 (discussing *Morales*, 504 U.S. at 390). In the court of appeals' view, under this Court's precedent, only "those [state] laws that actually have a direct effect on rates, routes, or services" are preempted by the ADA. *Id.* at 8. The court held that because an implied-covenant doctrine does not directly regulate prices or services, "the link" between respondent's claim and air carrier prices or services "is far too tenuous, and effectively would subsume all breach of contract claims." *Id.* at 17.

SUMMARY OF ARGUMENT

A claim is preempted under the ADA if it seeks to enforce a state law related to an air carrier's prices, routes, or services. 49 U.S.C. 41713(b)(1). There is little question that respondent's claim relates to petitioner's prices or services. And because respondent's claim seeks to impose an extra-contractual obligation on petitioner, the ADA preempts it.

A. This Court has repeatedly held that by preempting state law "related to" an air carrier's prices, routes, or services, Congress demonstrated a broad intent to preclude state-law claims "having a connection with, or reference to" prices, routes, or services. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). In *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), the Court held that claims challenging the retroactive change in the terms and conditions of a frequent-flyer program "relate to" air carrier prices "in the form of mileage credits for free tickets and upgrades" and to air carrier services such as

"flights and class-of-service upgrades." *Id.* at 226. Respondent's claim that petitioner improperly terminated his membership status in petitioner's frequent-flyer program, which gave him access to those rates and services, is no different.

Respondent argues (Br. in Opp. 19) that because he does not directly challenge petitioner's rates or services but instead contests only petitioner's termination of his status, his claim is too tenuously related to petitioner's prices or services to be "related to" them within the meaning of the statute. However, the ADA preempts claims even if "the effect is only indirect." *Morales*, 504 U.S. at 386. A frequent-flyer program provides specialized rates and services to its members, and respondent's claim that his membership status was improperly terminated thus has an obvious "connection with" an air carrier's prices and services. *Id.* at 384. Respondent further argues (Br. in Opp. 19-20) that his claim does not "relate to" an air carrier's prices or services because Congress did not intend to preempt claims based on the state common law of contract. But that argument is foreclosed by *Wolens*, which held that state contract claims "relate to" prices and services, 513 U.S. at 226, and it conflates the question of whether a claim is related to an air carrier's price or service with the separate question of whether the claim seeks to enforce the type of state law that Congress intended to preempt.

B. In *Wolens*, this Court held that the ADA's preemption provision does not preclude "routine breach-of-contract claims." 513 U.S. at 232. The statute prevents States "from imposing their own substantive standards with respect to rates, routes, or services" but does not preclude claims based on "the parties'

bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 232-233. The court of appeals construed *Wolens* as authorizing all contract claims against air carriers. Pet. App. 10. But that understanding overlooks the fact that this Court held that the ADA permits a contract claim only insofar as it seeks recovery "for the airline's alleged breach of its own, self-imposed undertakings." *Wolens*, 513 U.S. at 228. In rejecting respondent's breach-of-contract claim, the district court interpreted the contract as giving petitioner complete discretion to determine whether valid cause existed to terminate respondent's status. Respondent did not appeal from that decision. His reliance on an implied-covenant theory thus seeks to impose a non-contractual limitation on petitioner and is therefore preempted.

Petitioner asks the Court to reverse the court of appeals' judgment on the broader ground that implied-covenant claims always are preempted by the ADA. While we agree with petitioner that such claims have the potential to undermine the ADA's deregulatory purpose and to interfere with Congress's intent to entrust the Department of Transportation (DOT) with responsibility for investigating claims that air carriers are acting unfairly, we do not believe that it is necessary for the Court to adopt a categorical rule. The generic term "implied covenant of good faith and fair dealing" does not denote a single doctrine with a specific meaning. Some States use the rubric of the implied covenant to "rechristen[] fundamental principles of contract law." *Tymshare, Inc.* v. *Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.). Claims based upon such an application of the doctrine

likely would require only "adjudication of routine breach-of-contract claims," *Wolens*, 513 U.S. at 232, and so would not be preempted by the ADA. Other States, however, employ the doctrine to impose extra-contractual obligations. The ADA preempts claims based on such policies external to the agreement. *Id.* at 233.

Respondent, by contrast, argues that the ADA does not preempt any common-law claims, because that statute precludes only state "law[s], regulation[s], or other provision[s] having the force and effect of law." Br. in Opp. 18 (quoting 49 U.S.C. 41713(b)(1)). Relying on *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002), respondent suggests that such terms indicate a congressional intent to preempt only positive state enactments. The existing preemption provision codified an earlier version "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994). As originally enacted, the ADA's preemption provision precluded any "law, rule, regulation, *standard*, or other provision having the force and effect of law," § 4(a), 92 Stat. 1708 (emphasis added), and this Court has construed references to "standards" in preemption provisions as encompassing state common-law claims, see *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). Construing the ADA's preemption provision as precluding common-law-contract claims imposing requirements external to the contract is consistent with that precedent and this Court's decision in *Wolens*.

ARGUMENT

RESPONDENT'S IMPLIED-COVENANT CLAIM IS PREEMPTED BECAUSE IT RELATES TO THE PRICES AND SERVICES OF AN AIR CARRIER AND SEEKS TO ENFORCE AN EXTRA-CONTRACTUAL OBLIGATION

A. Respondent's Implied-Covenant Claim Relates To The Prices And Services Of An Air Carrier

1. To be preempted under the ADA, a claim must seek to enforce state law "related to a price, route, or service of an air carrier." See 49 U.S.C. 41713(b)(1). As in *Wolens*, this Court "need not dwell" on whether respondent's implied-covenant claim is one "relating to [air carrier] rates, routes, or services." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 226 (1995) (brackets in original) (quoting 49 U.S.C. App. 1305(a)(1) (1988), codified as amended at 49 U.S.C. 41713(b)(1)). In *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), this Court explained that "[t]he ordinary meaning" of "relating to" is "a broad one." *Id.* at 383; see *ibid.* (defining the words as "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with") (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)). The Court also observed that it had "repeatedly recognized," in interpreting "the similarly worded pre-emption provision of the Employee Retirement Income Security Act of 1974," 29 U.S.C. 1144(a), that the words "express a broad pre-emptive purpose." *Morales*, 504 U.S. at 383. Consistent with that precedent, the Court construed the ADA's preemption provision as precluding state-law claims "having a connection with, or reference to, airline 'rates, routes, or services.'" *Id.* at 384.

Morales rejected the contention that the ADA "only pre-empts the States from actually prescribing rates, routes, or services." 504 U.S. at 385. Such a construction, the Court reasoned, "simply reads the words 'relating to' out of the statute" and replaces it with the word "regulate." *Ibid.* Accordingly, the ADA preempts a state law "even if the law is not specifically designed to affect" air carrier rates, routes, or services, and even if "the effect is only indirect." *Id.* at 386; see also *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370-371 (2008) (similarly interpreting the preemption provision in Section 601(c) of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1606 (49 U.S.C. 14501(c)(1)), which was modeled on the ADA's preemption provision). The Court recognized, however, that although the ADA's preemption provision is broad, it has limits: "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Morales*, 504 U.S. at 390 (brackets in original) (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)).

The Court applied that standard in *Wolens* to a challenge to an airline's retroactive application of modified terms and conditions of a frequent-flyer program, brought under a state consumer-fraud statute and the state common law of contract. 513 U.S. at 225. The Court held that the "[p]laintiffs' claims relate[d] to 'rates,' *i.e.*, [the airline's] charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates." *Id.* at 226.

Under *Morales* and *Wolens*, there is little question that respondent's implied-covenant claim is one "related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). Respondent's claim that petitioner breached an implied covenant in terminating his status in petitioner's frequent-flyer program has "a connection with, or reference to," *Morales*, 504 U.S. at 384, the prices petitioner charges "in the form of mileage credits for free tickets and upgrades," *Wolens*, 513 U.S. at 226. It similarly relates to petitioner's services, insofar as the program affords its members access to flights, upgrades, and other benefits. See *ibid.* The court of appeals reached a contrary conclusion because it misunderstood this Court's precedents as holding "narrow[ly]" that the ADA preempts only those state laws "that actually have a direct effect on rates, routes, or services." Pet. App. 8, 9; see *id.* at 17-19. But this Court expressly rejected that interpretation in *Morales*. See 504 U.S. at 386 (holding that the ADA preempts state law even if "the effect is only indirect"); see also Pet. Br. 17-20.

2. Respondent's contrary arguments lack merit. Respondent contends that his claim "is far more tenuously related to prices, routes, and services than those at issue in *Wolens*" because it does "not relate to the value of [frequent-flyer] credits in general in obtaining tickets or upgrades, but to whether [petitioner] could terminate [respondent's] membership status in a customer loyalty program without valid cause." Br. in Opp. 19. That contention ignores the fact that membership in petitioner's frequent-flyer program is the very basis on which a customer obtains favorable rates and services from the airline.

Immediately following deregulation of the industry, airlines established frequent-flyer programs as a promotional device to encourage customer loyalty, principally among business travelers, who comprise the most lucrative segment of the market. See generally, Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, DOT, *Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems* 31-35 (Feb. 1990) (*Airline Marketing Practices*). Membership in a frequent-flyer program gives an individual access to lower rates, in the form of mileage credits, unavailable to other customers. *Id.* at 32. Respondent's complaint alleged that petitioner improperly deprived him of "accumulated mileage," the currency used to pay the rates charged under a frequent-flyer program. J.A. 45. Membership also gives a person access to air carrier services, such as air carriage and class-of-service upgrades, *Airline Marketing Practices* 32, and respondent's complaint alleged that petitioner improperly deprived him of access to "flight upgrades" and other services. J.A. 45. Claims like respondent's, involving membership in a frequent-flyer program, thus have a manifest "connection with, or reference to" air carrier prices and services, and so "quite obviously" "relat[e] to" those prices and services. *Morales*, 504 U.S. at 384, 387.

Respondent nevertheless suggests (Br. in Opp. 19-20) that his claim is not related to petitioner's prices or services because allowing his contract claim to proceed would not interfere with Congress's deregulatory goal. See *Rowe*, 552 U.S. at 371 ("[P]re-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and preemp-

tion-related objectives.") (quoting *Morales*, 504 U.S. at 390). But that argument is foreclosed by *Wolens*, which held that the plaintiffs' common-law-contract claims and statutory claims were both related to an airline's prices and services. 513 U.S. at 226. And it conflates the question of whether a claim is related to an air carrier's prices or services with the separate issue of whether the claim seeks to enforce the type of state "law" that is preempted by the ADA, an issue to which we now turn.

B. Respondent's Implied-Covenant Claim Seeks To Enforce An Extra-Contractual Obligation

1. The court of appeals understood this Court's decision in *Wolens* as drawing "a clear distinction * * * between state laws that regulate airlines and state enforcement of contract disputes." Pet. App. 10. That formulation is incorrect. The key "distinction," this Court explained, is "between what the State dictates and what the airline itself undertakes." *Wolens*, 513 U.S. at 233. That distinction is critical because the "core" of contract law "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 233 & n.8.

As the United States stated in *Wolens*, "[s]ome state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties." 513 U.S. at 233 n.8 (quoting U.S. Amicus Br. at 28 (No. 93-1286)); see, *e.g.*, 2 Restatement (Second) of Contracts 2 (1981) (Restatement) ("Sometimes * * * a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise

or other term on grounds of public policy."); see also, *e.g.*, *id.* § 208 (Unconscionable Contract or Term); U.S. Amicus Br. at 28, *Wolens*, *supra* (No. 93-1286) (suggesting that unconscionability claims would be preempted). Respondent's claim here, based on an implied covenant of good faith and fair dealing, is preempted because, in the circumstances of this case, it seeks to enforce a standard external to the document specifying petitioner's self-imposed obligations under its frequent-flyer program, which formed its contract with respondent and others who enrolled in the program.

Respondent's complaint alleged that petitioner improperly determined that he had abused the frequent-flyer program. J.A. 39-46. He also alleged that petitioner's termination of his membership status "was nothing more than a pretext for cost-cutting in advance of" petitioner's merger with another airline. J.A. 45. In Minnesota, the State whose law the district court found applicable in this case (Pet. App. 70), parties may separately plead claims for "breach of contract" and "breach of the implied covenant of good faith and fair dealing." *Columbia Cas. Co.* v. *3M Co.*, 814 N.W.2d 33, 35, 37 (Minn. Ct. App. 2012).[4] Respondent's complaint asserted both types of claims. J.A. 49-52. Respondent's breach-of-contract claim alleged that petitioner revoked his membership status

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[4] That pleading rule appears to be premised on a distinction between claims based on "breach of the express terms" of a contract and breach of terms that must be implied, such as "implied provisions indispensable to effectuate the intention of the parties and carry out the contract." *Columbia Cas. Co.*, 814 N.W. 2d at 37 (quoting *Watson Bros. Transp. Co.* v. *Jaffa*, 143 F.2d 340, 348 (8th Cir. 1944)).

"without valid cause." J.A. 49. His implied-covenant claim alleged that petitioner failed to exercise the discretion given to it under the contract "in a manner consistent with the reasonable expectations of the other party or parties." J.A. 51.

In dismissing respondent's breach-of-contract claim, the district court relied on the terms of the frequent-flyer contract giving petitioner the right to terminate respondent's membership for "improper conduct as determined by [petitioner] *in its sole judgment*.'" Pet. App. 71 (quoting J.A. 64). Interpreting that provision, the district court concluded that "the very issue of what qualifies as 'valid cause'" for termination of respondent's status "was left [by the contract] to the 'sole discretion' of [petitioner]." *Id.* at 71-72; see Pet. Br. 22 ("[T]he express contractual terms * * * put control over program membership in [petitioner's] 'sole judgment.'"); see also, *e.g.*, *id.* at 27, 32-33.

The district court's dismissal of respondent's breach-of-contract claim at the pleading stage may have been in error. The contract does not appear to have given petitioner unbridled discretion to terminate membership. Rather, it left to petitioner's "sole judgment" whether respondent had engaged in "improper conduct" amounting to "[a]buse of the [frequent-flyer] program." J.A. 64. To the extent, for example, that respondent alleged that petitioner had actually terminated his membership status for business reasons rather than for any conduct of "abuse" on his part—an allegation the district court noted (Pet. App. 60)—respondent might have asserted a valid breach-of-contract claim on the theory that petitioner's action was not authorized by the termination

provision. See Restatement § 202(3)(a) ("[W]here language has a generally prevailing meaning, it is interpreted in accordance with that meaning.").

Respondent, however, did not appeal from the dismissal of his breach-of-contract claim; he appealed only from the district court's dismissal of his implied-covenant claim. Pet. App. 5. It is possible that, under Minnesota law, a party may maintain a claim—whether under the rubric of an implied covenant of good faith and fair dealing or otherwise—on the theory that the other party exercised a contractual grant of discretion in a manner not contemplated by the parties at the time of the contract's formation. See *White Stone Partners, LP* v. *Piper Jaffray Cos.*, 978 F. Supp. 878, 880-885 (D. Minn. 1997).[5] But any such theory is foreclosed by the district court's interpretation of the contract itself as leaving to petitioner's "sole judgment" what constitutes "valid cause" for termination. Pet. App. 71-72; see *id.* at 47 (rejecting respondent's motion for reconsideration because, in part, respondent had not challenged the district court's determination that he "failed to allege any actual violation" of the contract).

Because respondent did not appeal from the dismissal of his breach-of-contract claim, the district court's holding that petitioner did not breach any obligation undertaken by petitioner under the terms of the contract itself would appear to be controlling here. Respondent's reliance on an implied covenant to trump the terms of the contract, as construed by the district court in the unappealed ruling, thus attempts

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[5] Because respondent's claim was dismissed at the pleading stage, the contours of his implied-covenant claim were not fully developed in the district court.

to enforce a standard external to petitioner's "own, self-imposed undertakings." *Wolens*, 513 U.S. at 228. Respondent's implied-covenant claim is, accordingly, preempted by the ADA, and the court of appeals' judgment should be reversed.

2. a. Beyond the circumstances of this case, petitioner urges the Court to adopt a bright-line rule that claims based on an implied covenant of good faith and fair dealing are always preempted by the ADA. See Pet. Br. 20-40. Under *Wolens*, such a rule would be sound insofar as an implied covenent was used to expand or limit contract terms based on a court's view of fairness, equity, or other policy considerations external to an air carrier's actual undertakings. And in other circumstances, even without reliance on such an implied covenant, ordinary tools of contract interpretation should often suffice for the adjudication of "routine breach-of-contract claims." *Wolens*, 513 U.S. at 232.

Congress's fundamental purpose in enacting the ADA was to promote "maximum reliance on competitive market forces," subject to limited regulation of air carriers by DOT. 49 U.S.C. 40101(a)(6); see *Wolens*, 513 U.S. at 230. Any contract claim against an air carrier must start from that basic premise. Contracts of carriage, for example, typically reserve to the air carrier the right to, "without notice * * * alter or omit stopping places shown on the ticket" and to change schedules. Delta Airlines, *Contract of Carriage* 3, http://www.delta.com/content/dam/delta-www/pdfs/legal/contract_of_carriage_dom.pdf. It would be wholly inconsistent with Congress's deregulatory purposes to allow claims based on any theory under state contract law that would cabin discretionary

decisions that air carriers have expressly reserved to themselves concerning prices, routes, or services, which Congress intended to leave to the airlines and market forces.

Frequent-flyer contracts, like contracts of carriage, also embody discretionary terms related to air carrier prices, routes, and services. For example, frequent-flyer contracts typically contain provisions permitting the carrier, in its discretion and without notice, to modify the rules, benefits, and awards under the program, as well as travel embargo dates and seat availability, even if such changes might affect the value of a member's accumulated mileage. See, *e.g.*, J.A. 63. As we have noted, airlines use frequent-flyer programs as marketing devices and compete directly with each other for passenger participation, loyalty, and commitment to their programs. It would be inconsistent with the ADA's deregulatory purposes, and with the ADA's preemption provision, for implied-covenant claims to be used to subject the numerous decisions made by the airlines in administering these programs to constant legal challenge based on extra-contractual notions of fairness.

In enacting the ADA, Congress assigned to DOT, not the courts, the responsibility for determining whether an air carrier has engaged in unfair conduct towards its passengers. Congress gave DOT the authority to "investigate and decide whether an air carrier * * * has been or is engaged in an unfair or deceptive practice or an unfair method of competition," 49 U.S.C. 41712(a), and to impose civil penalties for such conduct, 49 U.S.C. 46301(a)(1). To date, DOT has not chosen to adopt regulations governing frequent-flyer programs. But it has promulgated regula-

tions "to bolster air carriers' accountability to consumers," 14 C.F.R. 259.1, such as rules requiring air carriers to adopt customer-service plans, which must include disclosure of frequent-flyer rules, 14 C.F.R. 259.5, and imposing requirements for airlines' responses to consumer complaints, 14 C.F.R. 259.7. Congress has also specifically authorized DOT to investigate complaints relating to frequent-flyer awards. See FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 408(6), 126 Stat. 87.

Pursuant to its authority under those provisions, DOT conducts an active enforcement and consumer-protection program and routinely investigates complaints alleging unfair or deceptive actions by airlines. See generally DOT, *File a consumer complaint*, http://www.dot.gov/airconsumer/file-consumer-complaint. In the last year alone, DOT reviewed and investigated 289 complaints concerning airline frequent-flyer programs. See DOT, *Air Travel Consumer Report* 43 (2013), http://www.dot.gov/sites/dot.dev/files/docs/2013FebruaryATCR_0.pdf. It would be inconsistent with that regulatory scheme, and the ADA's larger deregulatory purpose, for courts to apply contract principles "based on state laws or policies external to the agreement," *Wolens*, 513 U.S. at 233, in adjudicating claims relating to air-carrier prices, routes, or services—especially where, as here, DOT has chosen not to directly regulate frequent-flyer programs. See *id.* at 228 & n.4 (holding state fraud statute preempted by the ADA, relying, in part, on DOT's authority to investigate unfair and deceptive practices); see also Pet. Br. 38-40.

b. For the foregoing reasons, invocation of an implied covenant to impose on an air carrier obligations

not affirmatively set forth in the contract itself would in many instances result in an "enlargement or enhancement" of the parties' bargain, *Wolens*, 513 U.S. at 233, and undermine the ADA's purposes. Because respondent's invocation of a covenant of good faith and fair dealing is preempted in the posture of this case (see pp. 17-20, *supra*), the Court need not decide more generally the circumstances in which a court may or may not invoke the rubric of such a covenant, or whether some more categorical rules would be appropriate—perhaps as a prophylactic matter in some respects to prevent imposition of obligations not actually undertaken by the airlines. But there are considerations about the evolution of such an implied covenant that suggest caution against absolute rules.

At the most general level, the implied-covenant doctrine states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2312 (2010) (brackets in original) (quoting Restatement § 205). As then-Judge Scalia explained, "the concept of good faith in the performance of contracts * * * 'is a phrase without general meaning (or meanings) of its own.'" *Tymshare, Inc.* v. *Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (quoting Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 201 (1968)). And unsurprisingly, in invoking such an implied covenant in contract disputes, States have had differing approaches. In some instances, the rubric of the implied covenant is used to "rechristen[] fundamental principles of contract law." *Id.* at 1152. It is possible that some claims based upon an application of

that version of an implied covenant would actually constitute the "adjudication of routine breach-of-contract claims," *Wolens*, 513 U.S. at 232, and hold the airline to "its own, self-imposed undertakings," *id.* at 228, and so would not be preempted by the ADA. In other States or other cases, however, courts might employ the doctrine to impose extra-contractual obligations. The ADA preempts claims based on such policies external to the agreement. *Id.* at 233.

i. It is not unusual for state courts, when construing contract terms, "[to] employ the good faith performance doctrine to effectuate the intentions of parties, or to protect their reasonable expectations." Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 371 (1980); see Restatement § 205 cmt. a ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.").[6]

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[6] See also, *e.g.*, *QBE Ins. Corp.* v. *Chalfonte Condo. Apartment Ass'n*, 94 So. 3d 541, 548 (Fla. 2012) ("This covenant is intended to protect the reasonable expectations of the contracting parties in light of their express agreement.") (internal quotation marks and citation omitted); *Blondell* v. *Littlepage*, 991 A.2d 80, 91 (Md. 2010) (holding that a duty arising out of an implied covenant "is simply a recognition of conditions inherent in expressed promises"); *Sanders* v. *FedEx Ground Package Sys., Inc.*, 188 P.3d 1200, 1203 (N.M. 2008) ("The implied covenant is aimed at making effective the agreement's promises.") (citation omitted); *Whitlock Constr., Inc.* v. *South Big Horn Cnty. Water Supply Joint Powers Bd.*, 41 P.3d 1261, 1267 (Wyo. 2002) ("The implied covenant of good faith and fair dealing requires that a party's action be consistent with the agreed common purpose and justified expectations of the other party.") (citation omitted); *Guz* v. *Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1110 (Cal. 2000) ("[The implied covenant] exists merely to prevent

Under that approach, for example, some courts refer to the doctrine in construing contractual grants of discretion to one party to impose an obligation "to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting," where the failure to observe such limits would deprive the other party "of a substantial proportion of the agreement's value." *Centronics Corp.* v. *Genicom Corp.*, 562 A.2d 187, 193 (N.H. 1989) (Souter, J.); see *Tymshare*, 727 F.2d at 1152 (applying the implied covenant rubric, as a form of an implied-limitation principle, to limit a contractual grant of discretion to one party to "honor[] the reasonable expectations created by the autonomous expressions of the contracting parties"); see also, *e.g.*, *Feld* v. *Henry S. Levy & Sons, Inc.*, 335 N.E.2d 320, 321, 323 (N.Y. 1975) (relying on an implied covenant in construing an output contract not to defeat the performance contemplated by the parties at the time of contract formation).

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one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made.") (emphasis omitted); *Bayou Land Co.* v. *Talley*, 924 P.2d 136, 154 (Colo. 1996) ("Generally, the implied covenant of good faith and fair dealing is used to effectuate the intention of the parties or to honor their reasonable expectations in entering into the contract."); *Garrett* v. *Bankwest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990) ("The implied obligation must arise from the language used or it must be indispensable to effectuate the intention of the parties.") (internal quotation marks and citation omitted); *Eis* v. *Meyer*, 566 A.2d 422, 426 (Conn. 1989) ("An implied covenant of good faith and fair dealing is essentially a rule of construction designed to fulfill the reasonable expectations of the contracting parties as they presumably intended.") (internal quotation marks, alterations, and citation omitted).

Because reliance on an implied covenant of good faith and fair dealing, under that approach, appears at bottom to be a method for interpreting the contract itself and determining the intent of the contracting parties, the covenant in that situation "cannot be used to overcome or negate an express term contained within a contract." *Sanders* v. *FedEx Ground Package Sys., Inc.*, 188 P.3d 1200, 1203 (N.M. 2008); see *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2130 (2013) ("[T]he express terms" of a contract are "the best indication of the intent of the parties.").[7] And because, under "[o]rdinary principles of contract interpretation," *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548 (2013), courts construe contracts "according to the intent of the parties," *Montana* v. *Wyoming*, 131 S. Ct. 1765, 1771 n.4 (2011), claims based on such a circumscribed reliance on an implied covenant in interpreting a contract could constitute one form of adjudicating "routine breach-of-contract claims," *Wolens*, 513 U.S. at 323, and would not be preempted by the ADA.

ii. On the other hand, at least some States have adopted a different understanding of the implied covenant that imposes obligations regardless of the intent

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[7] See also *Dick Broad. Co.* v. *Oak Ridge FM, Inc.*, 395 S.W.3d 653, 666 (Tenn. 2013) (stating that the implied covenant does not "create new contractual rights or obligations, nor can it be used to circumvent or alter the specific terms of the parties' agreement") (citation omitted); *WFND, LLC* v. *Fargo Marc, LLC*, 730 N.W.2d 841, 851 (N.D. 2007) (same); *511 W. 232nd Owners Corp.* v. *Jennifer Realty Co.*, 773 N.E.2d 496, 500-501 (N.Y. 2002) (same); *Barn-Chestnut, Inc.* v. *CFM Dev. Corp.*, 457 S.E.2d 502, 509 (W. Va. 1995) (same); *Farris* v. *Hutchinson*, 838 P.2d 374, 376 (Mont. 1992) (same); *Automatic Sprinkler Corp. of Am.* v. *Anderson*, 257 S.E.2d 283, 284 (Ga. 1979) (same).

of the contracting parties. In *Fortune* v. *National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977), for example, the Supreme Judicial Court of Massachusetts relied on the implied covenant in holding that the termination of an at-will employee was "not made in good faith [and] constitutes a breach of the contract." *Id.* at 1256. In that case, an employer allegedly terminated an employee on a particular date to avoid paying the employee a large bonus to which the employee would have been entitled had he remained in his position. *Id.* at 1253-1254. The court found it "clear that the [employment] contract itself reserved to the parties an explicit power to terminate the contract without cause on written notice." *Id.* at 1255. The court also found it "clear that under the express terms of the contract [the employee] has received all the bonus commissions to which he is entitled." *Ibid.* Thus, "[a]ccording to a literal reading of the contract," the employer "did not breach the contract." *Ibid.*

Despite the employer's "literal compliance with payment provisions of the contract," the Massachusetts court concluded that the employer had acted in bad faith, and so violated the implied covenant, by terminating the contract in order to limit its payments to the employee. *Fortune*, 364 N.E.2d at 1257-1258.[8]

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[8] See also, *e.g.*, *Ranier* v. *Mount Sterling Nat'l Bank*, 812 S.W.2d 154, 156-157 (Ky. 1991) (finding breach of implied covenant based on "[b]asic fundamental fairness and equity"); *Smith* v. *American Greetings Corp.*, 804 S.W.2d 683, 684 (Ark. 1991) (holding that the implied covenant "prohibits discharge for a reason which contravenes public policy" notwithstanding at-will employment contract); *Wagenseller* v. *Scottsdale Mem. Hosp.*, 710 P.2d 1025, 1036 (Ariz. 1985) (describing implied covenant as imposing a contract term as a matter of law, "even though the parties may not have intended it").

Claims based on such an understanding of an implied covenant are preempted by the ADA because that variant permits courts to override express contract terms and does not attempt to discern the contracting parties' intent.

3. a. Petitioner contends that an invocation of an implied covenant of good faith and fair dealing would permit courts to disregard the terms of contracts related to air carrier prices, routes, and services and so threaten Congress's intent to leave decisions concerning those matters to the airlines, subject only to market forces and limited oversight by DOT. Pet. Br. 28-40. Accordingly, petitioner urges the Court to limit judicial construction of an air carrier contract to only the "express terms" of the agreement. Pet. Br. 17; see *id.* at 27, 28-29. While the United States agrees that this Court should avoid any construction of the ADA that would undermine Congress's deregulatory purposes, petitioner's argument does not account for cases in which a contract is ambiguous or silent on a point and the court needs to determine the intent of the parties at the time of the contract's formation. See *McCutchen*, 133 S. Ct. at 1548-1549.

Where the express terms of a contract are unambiguous, they control, as they are "the best indication of the intent of the parties." *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2130. But contracts "may also leave gaps" and ambiguities. *McCutchen*, 133 S. Ct. at 1549. When faced with such uncertainties, courts employ principles of contract interpretation, such as the principle that courts will supply an omitted essential term (see Restatement § 204), as a means of discerning the parties' intent. See, *e.g.*, *Wood* v. *Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (Cardozo, J.)

(finding a contract "instinct with an obligation, imperfectly expressed") (internal quotation marks and citation omitted).

Wolens does not require courts to forgo use of such principles, which are part of the "adjudication of routine breach-of-contract claims." 513 U.S. at 232; see *McCutchen*, 133 S. Ct. at 1549 (stating that, in construing gaps or ambiguities in a contract, "a court properly takes account of background legal rules," and "'common-sense understandings * * * that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' [contrary] intent.'") (brackets in original) (quoting *Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan* v. *Wells*, 213 F.3d 398, 402 (7th Cir.) (Posner, J.), cert. denied, 531 U.S. 985 (2000)). To the extent that a court does no more than employ such principles in resolving routine breach-of-contract claims, even if under the rubric of an implied covenant of good faith and fair dealing, the adjudication would be consistent with *Wolens*.

Petitioner argues that "[b]ecause '[g]ood faith is a concept that defies precise definition,'" allowance of any claims based on the implied-covenant doctrine "all but guarantees a patchwork of inconsistent results." Pet. Br. 31, 32 (quoting *Brunswick Hills Racquet Club, Inc.* v. *Route 18 Shopping Ctr. Assocs.*, 864 A.2d 387, 395 (N.J. 2005)). But the assertedly "amorphous" (*id.* at 29) nature of the doctrine, when viewed from a national perspective, stems in part from the fact that some States have collected various disparate components of traditional contract law principles under that label, while other States use the doctrine in some

contexts to implement extra-contractual policy objectives. Preemption analysis is not conducted wholesale, however.

Whether a State's law is preempted by a federal statute requires consideration of specific state law in the context of a case implicating the federal law, as petitioner elsewhere recognizes. See Pet. 17 ("*Wolens* at the very least requires an individualized inquiry into the nature of the implied covenant of good faith claim asserted by the plaintiff."). If a State's implied-covenant doctrine "is used only as a construction aid in determining the intent of contracting parties," *Cramer* v. *Insurance Exch. Agency*, 675 N.E.2d 897, 903 (Ill. 1996), then the ADA does not preempt it. But it is preempted if a State uses the doctrine as a device to enforce obligations other than the air carrier's "own, self-imposed undertakings." *Wolens*, 513 U.S. at 228. Accordingly, petitioner is correct in saying that applications of the implied-covenant doctrine seeking to enforce "fundamental notions of fairness" or "community standards" external to the contract are preempted by the ADA. Pet. Br. 24 (quoting *Farnsworth on Contracts* § 7.17 (3d ed. 2004) and Restatement § 205 cmt. a); see *id.* at 26, 29, 40.

b. Respondent, for his part, contends that his claim "is not preempted because it arises under the common law and does not involve a 'law, regulation, or other provision having the force and effect of law.'" Br. in Opp. 18 (quoting 49 U.S.C. 41713(b)(1)). In support of that argument, respondent relies on *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002). See Br. in Opp. 18. In that case, this Court held that a provision of a federal law preempting "'a [state or local] law or regulation'" was "most naturally read as

not encompassing common-law claims." *Sprietsma*, 537 U.S. at 63 (brackets in original) (quoting 46 U.S.C. App. 4306 (1988)). That was because the provision used "the article 'a' before 'law or regulation' impl[ying] a discreteness—which is embodied in statutes and regulations—that is not present in the common law." *Ibid.* The court also concluded that "the terms 'law' and 'regulation' used together in the pre-emption clause indicate that Congress pre-empted only positive enactments." *Ibid.*; see *ibid.* ("[A] word is known by the company it keeps.") (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995)).

The Court's conclusion in *Sprietsma* that the federal statute did not preempt a state common-law cause of action for damages was "buttresse[d]" by the inclusion of a "saving clause" in the statute providing that compliance with federal law "does not relieve a person from liability at common law or under State law." 537 U.S. at 63 (quoting 46 U.S.C. App. 4311(g) (1988)). The Court observed that the "saving clause assumes that there are some significant number of common-law liability cases to save [and t]he language of the pre-emption provision permits a narrow reading that excludes common-law actions." *Ibid.* (brackets in original) (quoting *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 868 (2000)).

The ADA's preemption provision, like the one at issue in *Sprietsma*, uses the terms "law," "regulation," and "provision," which, standing alone, would generally connote positive enactments. 49 U.S.C. 41713(b)(1). However, as originally enacted, that provision preempted any state "law, rule, regulation, *standard*, or other provision having the force and effect of law relating to rates, routes, or services of any air carri-

er." ADA § 4(a), 92 Stat. 1708 (emphasis added). This Court has construed references to "standards" in preemption provisions as encompassing state common-law claims. See *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). When Congress codified the existing ADA preemption provision, it indicated that the codification was intended to be "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994); see § 1(d), 108 Stat. 1143. There accordingly is no reason to conclude that Congress intended to exclude from preemption under the ADA all common-law claims, even those based on judicially fashioned substantive standards external to the contract. And, indeed, this Court has construed the ADA's preemption provision in a more limited manner. Reading it together with the ADA's saving clause, which preserves "the remedies now existing at common law or by statute," the Court held that the preemption provision permits "routine breach-of-contract claims" but "stops States from imposing their own substantive standards with respect to rates, routes, or services." *Wolens*, 513 U.S. at 232 (quoting 49 U.S.C. App. 1506 (1988)) (codified as amended at 49 U.S.C. 40120(c)); see also *id.* at 233 n.8.[9]

---

[9] Although not at issue in this case, the FAAAA preemption provision, 49 U.S.C. 14501(c)(1), also likely preempts at least some common-law claims. Although that provision refers only to a state "law, regulation, or other provision having the force and effect of law," *ibid.*, Congress modeled it on the ADA's preemption provision, as that provision was originally enacted, and intended it to have the same scope. See H.R. Rep. No. 677, 103d Cong., 2d Sess. 82-83 (1994). Last Term, the United States argued that the words in the FAAAA preemption provision suggest that "Congress was focusing on duties imposed by positive enactments and regulatory powers, not on common-law remedies." U.S. Amicus Br. at 24,

In any event, the issue likely is academic. Even if a saving clause removes a common-law claim from the scope of an express preemption provision, the Court will nevertheless consider whether such a claim "actually conflict[s]" with the statutory scheme. *Geier*, 529 U.S. at 869; see *id.* at 869-874. There is little question that a common-law claim based on a State's substantive policies relating to prices, routes, or services of an air carrier would conflict with the ADA's deregulatory purpose and so would be preempted on implied preemption grounds, even if it is not precluded by the ADA's express preemption provision. See *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1748 (2011) ("[A] federal statute's saving clause 'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.'") (second pair of brackets in original) (quoting *American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998)).

Dan's City Used Cars, Inc. v. *Pelkey*, 133 S. Ct. 1769 (2013) (No. 12-52). That argument is not entirely correct, in light of the FAAAA preemption provision's origin and for the reasons stated in the text. The Court did not rely on that argument in resolving that case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-462

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

NORTHWEST, INC., and DELTA AIR LINES, INC.,
Petitioners,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF AMICI CURIAE

The Air Transport Association of America, Inc., (d.b.a. Airlines for America and hereafter referred to as A4A) is the trade association of the principal United States airlines. Together with their affiliates, those airlines transport more than ninety percent of U.S. airline passengers and cargo traffic. A4A's airline members are Alaska Airlines, Inc.; American Airlines, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; UPS Airlines; US Airways, Inc.; and associate member Air Canada. *See* http://www.airlines.org/Pages/Members.aspx (last visited July 31, 2013).[1]

A4A's mission is to foster a business and regulatory environment that ensures safe and secure air transportation while permitting U.S. airlines to flourish, thereby stimulating economic growth locally, nationally, and internationally. As part of its mission, A4A seeks to identify and challenge laws and policies that impose inappropriate regulatory burdens on airlines. A4A has frequently participated as amicus curiae before this Court and others, including in cases concerning the preemption provision of the Airline Deregulation Act of 1978, or ADA, Pub. L. No. 95-504, § 4(a), 92 Stat. 1705 (codified as amended at 49 U.S.C. § 41713(b)(1)). Be-

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, and its counsel made a monetary contribution intended to fund the preparation of submission of this brief. Petitioners' blanket letter of consent has been filed with the Court. Respondent's written consent accompanies this brief.

cause the proper application of that provision is of critical importance to A4A's members, A4A has a strong interest in the resolution of this case.

American Trucking Associations, Inc., or ATA, is the national association of the trucking industry. Its direct membership includes approximately 2,000 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the states. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including on numerous occasions before this Court.

The national trucking industry is an essential pillar of the American economy and lifestyle. To efficiently and competitively undertake the millions of daily—often interstate—shipments on which the economy depends, trucking companies must be free of individualized state regulatory requirements. Federal preemption of such requirements thus allows the trucking industry to meet the needs of the American economy. Congress put such preemption in place in 1994, enacting the Federal Aviation Administration Authorization Act, or FAAAA, Pub. L. No. 103-305, 108 Stat. 1569. As this Court has explained, that Act's preemption provision was "copied" from the ADA. *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008). This Court has thus interpreted the two provisions in parallel. *See id.* For that reason, ATA and its members have a direct and immediate interest in the Court's decision in this case.

SUMMARY OF ARGUMENT

Amici agree with petitioners' arguments for why the Ninth Circuit's judgment in this case should be reversed. In particular, amici agree that respondent's implied-covenant claim seeks to enlarge the parties' contractual bargain and hence does not fall within the narrow exception from preemption for true breach-of-contract claims that this Court recognized in *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995). Amici also submit that the Ninth Circuit's decision in *Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc), *amended on denial of reh'g*, 169 F.3d 594 (9th Cir. 1999) (en banc)—on which the Ninth Circuit's decision here relied in part—is starkly inconsistent with this Court's ADA precedent.

Amici will focus here, however, on an argument that was not pressed or passed on in the court of appeals but that other courts have recently addressed: that the ADA preempts only positive state laws, i.e., that *all* common-law claims are categorically exempt from preemption by the statute. *See, e.g.*, *Brown* v. *United Airlines, Inc.*, ___ F.3d ___, 2013 WL 3388904 (1st Cir. July 9, 2013) (rejecting such an argument); *Spinrad* v. *Comair, Inc.*, 825 F. Supp. 2d 397, 412-413 (E.D.N.Y. 2011) (Weinstein, J.) (suggesting in dicta that the argument has merit). That argument finds no support in the text of the ADA and gainsays decades of judicial precedent.

I. The relevant portion of the ADA's preemption provision refers to any state "law, regulation, or other provision having the force and effect of law," 49 U.S.C. § 41713(b). That language easily encompasses common-law claims.

If there were any doubt about that conclusion, it would be dispelled by the history of the preemption provision. The pertinent portion of that provision originally read: "any [state] law, *rule*, regulation, *standard*, or other provision having the force and effect of law." 49 U.S.C. App. § 1305(a)(1) (1988) (emphasis added). This language unquestionably encompassed common-law claims, as several courts of appeals held. And when Congress revised the preemption provision in 1994, as part of a general rewrite of the Federal Aviation Act (FAA), it specified that the revisions were not intended to make any substantive change. The current language is thus properly read to encompass common-law claims, as the original version did.

The conclusion that the ADA reaches some common-law claims is not altered by the FAA's "saving clause." That clause simply provides that a plaintiff may be able to obtain state-law remedies for violations of certain federal duties or self-imposed obligations. Nothing in it preserves substantive state-law rules of conduct from preemption, including rules derived from the common law.

II. The argument that common-law claims are categorically exempt from preemption under the ADA also contradicts settled precedent. First, in *Wolens* this Court carefully distinguished which common-law claims are preempted by the ADA and which are not. That nuanced line drawing would have made little sense if *all* common-law claims escape ADA preemption.

Second, for over two decades the all-but-universal understanding among the lower courts has been that common-law claims can be preempted by the ADA. The First and Seventh Circuits have so concluded expressly. And numerous other lower courts have held

specific common-law claims preempted by the ADA, albeit without explicitly addressing the issue. Not one court, by contrast, has held that common-law claims categorically escape ADA preemption.

ARGUMENT

I. The Text Of The ADA's Preemption Provision Encompasses Common-Law Claims

Through much of the 20th century, airlines were subject to extensive economic regulation by the federal government. *See generally Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992); H.R. Rep. No. 95-1211, at 1-2 (1978). In 1978, however, Congress did away with virtually all of that regulation by enacting the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. That act reflected Congress's determination that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices, as well as variety [and] quality ... of air transportation services." *Morales*, 504 U.S. at 378 (alterations and omission in original) (internal quotation marks omitted).

In relieving airlines of the burdens of federal economic regulation, Congress "did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989). Thus, "to ensure that the States would not undo federal deregulation with regulations of their own, [Congress] included a pre-emption provision" in the ADA. *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008) (internal quotation marks omitted). That provision commanded (with exceptions not relevant here) that "no State or political subdivision ... shall enact or enforce any law, rule, regulation, stand-

ard, or other provision having the force and effect of law relating to rates, routes, or services of any [federally licensed] air carrier." ADA § 4(a), 92 Stat. at 1708. Following a 1994 revision that Congress explicitly labeled non-substantive, the clause now reads: "[A] State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1); *see American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 223 n.1 (1995) ("Congress intended th[is] revision to make no substantive change."). As explained below, this language—even divorced from its history, and certainly when considered in light of that history—reaches not only positive state enactments but also provisions of state common law.

A. Even Viewed In Isolation, The Current Text Of The ADA Preempts Common-Law Claims

1. The ADA's current phrasing encompasses claims brought under state common law. That is because a common-law doctrine "counts as an 'other provision having the force and effect of law' for purposes of" the ADA. *United Airlines, Inc.* v. *Mesa Airlines, Inc.*, 219 F.3d 605, 607 (7th Cir. 2000) (Easterbrook, J.). Indeed, "when read in context, the word 'provision' in the ADA preemption clause can most appropriately be construed to include common law." *Brown* v. *United Airlines, Inc.*, ___ F.3d ___, 2013 WL 3388904, at *7 (1st Cir. July 9, 2013).

To be sure, this Court has held that a preemption clause that referred only to "a [state] law or regulation" did not encompass state common-law. *See Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002). But the ADA also preempts a third category of state law, "other provision[s] having the force and effect of law." Under the

"cardinal rule that, if possible, effect shall be given to every clause and part of a statute," *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012), that additional language must have independent significance. The significance is that "other provision" refers to the third principal source of state law: common law. *See Brown*, 2013 WL 3388904, at *8 (deeming that to be the "most obvious purpose" of the "other provision" language). Such a reading is consistent with this and other courts' use of the word "provision" to refer to the common law. *See, e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 n.3 (1994) ("Under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law[.]").[2]

The canon of *ejusdem generis*—i.e., "that when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration," *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 223 (2008) (internal quo-

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[2] *See also United States* v. *Barnett*, 376 U.S. 681, 699-700 (1964) ("'The power to fine and imprison for contempt ... is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law.'" (quoting *Watson* v. *Williams*, 36 Miss. 331 (1858)); *Caribbean Mushroom Co.* v. *Government Dev. Bank for P.R.*, 102 F.3d 1307, 1309 n.2 (1st Cir. 1996) (statute referring to "provisions of the common law"); *Rios* v. *Nicholson*, 490 F.3d 928, 931 (Fed. Cir. 2007) (referring to the "mailbox rule" as a "common law provision"); *Hardin* v. *BASF Corp.*, 397 F.3d 1082, 1085 (8th Cir. 2005), *vacated on reh'g* (June 29, 2005); *Yount* v. *Acuff Rose-Opryland*, 103 F.3d 830, 834 (9th Cir. 1996); *Hanton* v. *Gilbert*, 36 F.3d 4, 6 (4th Cir. 1994); *Resolution Trust Corp.* v. *Miramon*, 22 F.3d 1357, 1360 (5th Cir. 1994); *United States* v. *Woods*, 986 F.2d 669, 678 n.18 (3d Cir. 1993); *Boudin* v. *Thomas*, 732 F.2d 1107, 1114 (2d Cir. 1984).

tations omitted)—does not support reading the ADA's preemption provision to exclude common law. That is because common law *is* "akin" to the specific terms enumerated in the ADA. *See Brown*, 2013 WL 3388904, at *8 ("The trilogy of statutes, regulations, and common law comprises a natural grouping, with each component having roughly equal weight."). Like state laws and regulations, state common law imposes obligations that shape primary conduct. *See Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion) ("'[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959))); *accord Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1269-1270 (2012). Thus, state common law, no less than state statutes and regulations, can undermine Congress's effort to end government economic regulation of airlines and thereby allow market forces to prevail. In any event, this Court has cautioned against applying the *ejusdem generis* canon where it would lead to a result contrary to the overall statutory text and purpose. *See, e.g.*, *Ali*, 552 U.S. at 227; *Norfolk & W. Ry. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991) ("The canon does not control ... when the whole context dictates a different conclusion."). That is the situation here.

Nor does any "presumption against preemption" suggest that the ADA should be read not to reach state common law. *See, e.g.*, *Brown*, 2013 WL 3388904, at *4-5. As this Court has explained, "an 'assumption' of non-pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). Again, that is the situation here: The fed-

eral government has long dominated the regulation of interstate air travel. *See, e.g.*, S. Rep. No. 85-1811, at 5 (1958) ("[A]viation is ... the only [transportation industry] whose operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities."). This Court has thus not applied a presumption against preemption in cases involving the ADA.

2. The balance of the ADA's preemption provision is consistent with the conclusion that the provision reaches state common law. For example, the ADA prohibits the "enforce[ment]" of state laws. 49 U.S.C. § 41713(b)(1). Common usage, including by this Court, makes clear that courts "enforce" common-law doctrines by applying them in individual cases. *See County of Sacramento* v. *Lewis*, 523 U.S. 833, 854 n.14 (1998) (referring to "courts enforcing the common law of torts"); *see also Brown*, 2013 WL 3388904, at *4 & n.3 (stating that a common-law "suit is backed by the weight of the state judiciary enforcing state law" and that it "makes no difference that the plaintiffs ... are attempting to enforce state common law ... in federal court"). There is also no plausible argument that the ADA cannot reach common-law claims because state courts (from which state common law originates) are not part of "a State, political subdivision of a State, or political authority of at least 2 States," 49 U.S.C. § 41713(b)(1). In *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312 (2008), this Court held common-law claims preempted by a provision that similarly applied only to a "State or political subdivision of a State," *id.* at 316.

3. Finally, as discussed above in the context of the *ejusdem generis* canon, reading the ADA not to preempt any common-law claims would make little sense. A common-law judgment "can be, indeed is de-

signed to be, a potent method of governing conduct and controlling policy." *Riegel*, 552 U.S. at 324. Thus, state common law may "disrupt[] the federal scheme no less than state regulatory law to the same effect." *Id.* at 325; *accord Brown*, 2013 WL 3388904, at *6 ("[C]ourts adjudicating common-law claims can create just as much uncertainty and inconsistency in a carefully calibrated federal regulatory framework as can state legislatures enacting statutes or state agencies promulgating regulations."). Categorically excepting common-law claims from the scope of the ADA would allow state courts to impose any number of onerous and detailed obligations on airlines, i.e., allow them to "undo federal deregulation with regulation of their own," *Rowe*, 552 U.S. at 368.

This case provides a good example. As noted, Congress enacted the ADA in part to promote the "quality ... of air transportation services." *Morales*, 504 U.S. at 378 (omission in original). One of the most innovative and consumer-friendly of those services are frequent-flyer programs like the one at issue here, which reward the loyalty of an airline's most valuable customers. Although actions to terminate a program participant are exceedingly rare, airlines—in order to provide the benefits of the programs and to keep them fair to all participants—must be able to address the unusual situation in which a customer abuses a program. Common-law actions like this one interfere with airlines' ability to do so, subjecting airlines to a patchwork of state laws (backed by the possibility of jury awards). It should not "lightly be presumed" that Congress intended a result that would so frustrate the "very purposes" of the ADA. *Sullivan* v. *Hudson*, 490 U.S. 877, 890 (1989).

B. The History Of The ADA's Preemption Clause Confirms That The Clause Encompasses Common-Law Claims

If there were any doubt about whether the ADA reaches common-law claims, the preemption provision's history would dispel it. *See Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 542 (2001) ("We are aided in our interpretation by considering the predecessor preemption provision and the circumstances in which the current language was adopted.").

As originally enacted in 1978, the preemption clause read: "[N]o State ... shall enact or enforce any law, *rule*, regulation, *standard*, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." 49 U.S.C. App. § 1305(a)(1) (1988) (emphasis added), *quoted in Wolens*, 513 U.S. at 222-223. That language plainly encompassed common-law claims, which embody state-law "rules" and "standards." Indeed, this Court has held that a nearly identical phrase in the Federal Railroad Safety Act—specifically, "law, rule, regulation, order, or standard"—includes "[l]egal duties imposed ... by the common law." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993).[3] Similarly, in *Riegel* the Court

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[3] A fuller excerpt of the preemption provision interpreted in *CSX Transportation* is as follows:

> Congress declares that laws, rules, regulations, orders, and standards shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.

45 U.S.C. § 434, *quoted in CSX Transp.*, 507 U.S. at 662 n.2.

held that reference to a state's "requirements," a term synonymous with "rules," "includes [the state's] common-law duties." 552 U.S. at 324.

In line with these decisions, several lower courts held prior to 1994 that the ADA preempted common-law claims. The Seventh Circuit, for example, explained that the ADA prevented states from regulating airlines "by common law or by statute." *Statland* v. *American Airlines, Inc.*, 998 F.2d 539, 542 (7th Cir. 1993). Other courts reached similar conclusions, though without extensive discussion. *See, e.g.*, *West* v. *Northwest Airlines, Inc.*, 995 F.2d 148, 151 (9th Cir. 1993) ("We find that, under the reasoning in *Morales*, the ADA preempts West's claim for punitive damages under state contract and tort law[.]"); *O'Carroll* v. *American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir. 1989) ("O'Carroll's common law claims are preempted by section 1305[.]"); *Anderson* v. *USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987) ("A state [common-]law obligation to give courteous service... is expressly preempted by [the ADA.]"). To amici's knowledge, no court held to the contrary, i.e., that the ADA did not preempt any common-law claims.

In 1994, Congress effected a wholesale re-codification of Title 49, which included removing the words "rules" and "standards" from the relevant portion of the ADA's preemption provision. Congress explicitly stated, however, that the changes made in the re-codification (including to the ADA) were not substantive:

> Certain general and permanent laws of the United States, related to transportation, are revised, codified, and enacted by subsections (c)–(e) of this section *without substantive*

> *change* as subtitles II, III, and V–X of title 49, United States Code, "Transportation".

Pub. L. No. 103-272, § 1(a), 108 Stat. 745, 745 (1994) (emphasis added). This Court subsequently recognized Congress's "inten[t] ... to make no substantive change" from the prior version of the ADA. *Wolens*, 513 U.S. at 223 n.1.

Because Congress did not substantively alter the ADA in 1994, the preemption provision's reach is defined by the original language. As explained, that language manifestly encompasses common-law claims. Even if it were otherwise, the fact that courts had construed the original language to encompass common-law claims means that the recodified statute does so. "Congress is presumed to be aware of a[] ... judicial interpretation of a statute *and to adopt that interpretation* when it re-enacts a statute without change." *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009) (emphasis added); *see also, e.g.*, *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1795-1796 (2010) (finding that Congress intended to incorporate the unanimous holding of the courts of appeals in subsequently enacted legislation).

C. The FAA's "Saving Clause" Does Not Support A Categorical Exemption From ADA Preemption For Common-Law Claims

The conclusion that the ADA encompasses common-law claims is not altered by the Federal Aviation Act's "saving clause," which provides that "[a] remedy

under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c).[4]

The saving clause was not enacted as part of the ADA and is not specifically directed to it. It is, rather, part of the sprawling and multifaceted FAA (i.e., "this part"). That statute (which now spans sections 40101 to 46507 of Title 49) addresses topics as diverse as airmail, labor-management relations, insurance, safety regulation, security, airport fees, and aircraft-noise regulation. Until 1978, the FAA contained a precursor to the saving clause but had no preemption provision; the ADA was added as an amendment to the FAA.

This Court thus explained in *Morales* that "the 'saving' clause is a relic of the pre-ADA/no pre-emption regime," and "cannot be allowed to supersede the specific substantive pre-emption provision." 504 U.S. at 385. In other words, the saving clause cannot justify giving the ADA's preemption provision a narrow construction, particularly given that it is not even directed at the preemption provision and retains abundant application outside that provision's scope.

Refusing to read the saving clause as dictating a categorical preemption exemption for common-law claims still leaves the clause with substantial significance. For one, the clause clarifies that, insofar as provisions in the FAA create "remedies," courts should not infer that those federal remedies automatically displace "any other remedies provided by law," 49 U.S.C.

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[4] Like the ADA's preemption provision (and the rest of Title 49), the saving clause was revised in 1994. The original version read: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506 (1976).

§ 40120—including remedies arising under state common law. The saving clause thus continues to preserve, for example, state-law remedies that pertain to aviation but are not "related to a price, route, or service of an air carrier" within the meaning of the ADA's preemption provision (and are not otherwise preempted).

Moreover, the saving clause may preserve state *remedies* for violations of duties derived from other sources. This Court suggested as much in *Wolens*, stating that the ADA's preemption provision, "read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." 513 U.S. at 232-233.

Neither *Sprietsma* nor *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), dictates a different conclusion regarding the import of the FAA's saving clause. Although both cases relied in part on the presence of a saving clause in holding common-law claims not to be preempted, *see Sprietsma*, 537 U.S. at 63; *Geier*, 529 U.S. at 867-868, the provisions at issue in those cases were materially different from those here. In particular, neither *Sprietsma* nor *Geier* involved the application of a generally applicable saving clause to a later-added and more specific preemption provision. Each instead applied a saving clause enacted together with the relevant preemption provision. *See Geier*, 529 U.S. at 868; *Sprietsma*, 537 U.S. at 57-58, 63. Here, in contrast, the saving clause was enacted decades before the ADA's preemption provision, applies to a much broader field than the one addressed by the ADA, and thus—as this Court held in *Morales* (*see* 504 U.S. at 385)—reveals little about the meaning of the ADA. *See*

Brown, 2013 WL 3388904, at *9 (distinguishing *Sprietsma* and *Geier* on this basis).

II. EXEMPTING ALL COMMON-LAW CLAIMS FROM ADA PREEMPTION WOULD CONTRADICT SETTLED PRECEDENT

A holding that the ADA does not preempt any common-law claims would derogate not only the statutory text but also established case law. To begin with, this Court's decision in *Wolens*—which carefully parsed which common-law claims are subject to ADA preemption and which are not—makes clear that there is no categorical exception for such claims. In addition, since adoption of the ADA, the uniform understanding of the lower courts has been that common-law claims do not always escape preemption. There is no reason to upend that settled view.

A. *Wolens* Demonstrates That The ADA Includes No Blanket Exception For Common-Law Claims

In *Wolens* this Court considered whether the ADA preempted a state common-law claim for breach of contract. *See* 513 U.S. at 226, 228-229. Although the Court held that the claim was not preempted, nothing in its opinion suggests that this holding rested on the view that *all* common-law claims escape ADA preemption. To the contrary, the Court explained that the reason the claim could proceed was that the ADA "bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves." *Id.* at 222. Underscoring this distinction, the Court stressed that the ADA "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancements based on state laws

or policies external to the agreement." *Id.* at 233. *Wolens* thus recognized only a narrow exception from ADA preemption, for claims "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 228.

If common-law claims categorically escaped preemption under the ADA, *Wolens* would not have needed to draw such a nuanced line. The Court could simply have stated that the breach-of-contract claim was not preempted because it arose under the common law. Similarly, the Court would not have needed to explain that other breach-of-contract claims *would* be preempted to the extent that applicable common-law rules imported "state ... policies external to the agreement." 513 U.S. at 233. The Court's opinion thus clearly rests on the assumption that there are some state common-law claims—including some breach-of-contract claims—falling outside the exception the Court recognized. In short, *Wolens* is fundamentally at odds with the argument that all common-law claims are exempt from ADA preemption.

B. A Phalanx Of Lower Court Precedent Is Inconsistent With The Assertion That No Common-Law Claims Are Preempted By The ADA

The argument that no common-law claims are preempted by the ADA also founders on more than twenty years of lower-court precedent. As explained above (*see* Part I.B.), prior to 1994 all lower courts that considered the question found (explicitly or implicitly) that the ADA's preemption provision encompassed common-law claims. That understanding has not changed since 1994. To the contrary, the two circuits that have directly confronted the issue both held that

"[s]tate common law counts as an 'other provision having the force and effect of law.'" *Mesa Airlines, Inc.*, 219 F.3d at 607; *see also Brown*, 2013 WL 3388904, at *4 ("The plaintiffs ... say that ... the term 'other provision[]' ... does not include common law. We do not agree.").

Seven other circuits, while not explicitly rejecting the categorical-preemption question, have also held common-law claims preempted by the ADA. *See, e.g.*, *Onoh* v. *Northwest Airlines, Inc.*, 613 F.3d 596, 599 (5th Cir. 2010) ("Any state law, including state common law, having a connection with or reference to airline prices, routes, or services is preempted unless the connection or reference is too tenuous, remote or peripheral." (internal quotation marks omitted)); *Weiss* v. *El Al Israel Airlines*, 309 F. App'x 483, 484 (2d Cir. 2009) ("The parties agree that a common law tort action is a 'law, regulation, or other provision having the force and effect of law[.]'"); *Weber* v. *USAirways, Inc.*, 11 F. App'x 56, 57-58 (4th Cir. 2001) (common-law fraud claim held preempted); *Musson Theatrical, Inc.* v. *Federal Express Corp.*, 89 F.3d 1244, 1247, 1251 (6th Cir. 1996) (state common-law fraud claims held preempted); *Sanchez* v. *Aerovias De Mex., S.A. De C.V.*, 590 F.3d 1027, 1031 (9th Cir. 2010) (similar); *Koutsouradis* v. *Delta Air Lines, Inc.*, 427 F.3d 1339, 1344 (11th Cir. 2005) (similar); *Anderson*, 818 F.2d at 57 (similar). Of the remaining circuits, none has held all common-law claims exempt from ADA preemption. *See Brown*, 2013 WL 3388904, at *6 ("The only reported circuit court decision that squarely addresses the question of whether

the 'other provision' language extends to state common law answers that question in the affirmative.").[5]

Many of these cases admittedly did not explicitly address the categorical-exemption argument. Yet in considering the proper scope of the ADA, it is surely relevant that the judges and litigants in dozens of cases decided over a period of roughly two decades have uniformly assumed (if not affirmatively concluded) that the ADA does not categorically except common-law claims from preemption.

Finally, it is true some circuits have found individual common-law claims *not* preempted by the ADA. But those claims were deemed not to "relate to" an airline's prices, routes, or services, which is a prerequisite for ADA preemption. *See, e.g.*, *Taj Mahal Travel, Inc.* v. *Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998). These cases thus provide no support for the notion that state common-law claims categorically escape ADA preemption. As explained herein, they do not.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[5] There are likewise numerous lower-court decisions holding common-law claims preempted by the FAAAA. *See, e.g.*, *S.C. Johnson & Son, Inc.* v. *Transport Corp. of Am.*, 697 F.3d 544, 561 (7th Cir. 2012); *Data Mfg., Inc.* v. *United Parcel Serv., Inc.*, 557 F.3d 849, 853 (8th Cir. 2009); *see also supra* p.3 (explaining that the FAAAA and ADA are interpreted identically for preemption purposes).

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., and DELTA AIR LINES, INC., a Delaware corporation,
Petitioners,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,
Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF AMICUS

Pursuant to Rule 37, Amicus Curiae Steven J. Burton respectfully submits this brief in support of Respondent Rabbi S. Binyomin Ginsberg.[1]

Steven J. Burton is the John F. Murray Professor of Law at the University of Iowa. His work on contractual good faith has been cited by Petitioners and Respondents in their merits briefs, by the United States in its amicus brief, and by numerous courts, including the Minnesota Supreme Court.

Professor Burton has authored or co-authored one book and five law review articles on the subject. His landmark *Breach of Contract and the Common Law Duty to Perform in Good Faith* 94 Harv. L. Rev. 369 (1980) [hereinafter Burton HLR] has played a large role in shaping the law throughout the United States: this article alone has been cited by courts well over one-hundred times. As of 2001, it had been cited almost five times more often than the next most cited contracts article published in a major journal after 1979. *See* Gregory Scott Crespi, *The Influence of Two Decades of Contract Law*

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amicus and his counsel made a monetary contribution to its preparation or submission. Petitioners' blanket consent to amicus is reflected on the docket, and Respondent's consent to the filing of this brief is attached.

Scholarship on Judicial Rulings: An Empirical Analysis, 57 SMU L. Rev. 105, 113-15 (2004).

SUMMARY OF THE ARGUMENT

Both Parties agree this case turns in important part on whether Minnesota's implied covenant of good faith and fair dealing ("Implied Covenant") is a state-imposed regulation or a voluntary undertaking. Both Parties, and the United States, cite Amicus Curiae Steven J. Burton's scholarship to support their view on this question. Professor Burton submits that it is well-established (as documented by him in five law review articles and a book) that the Implied Covenant is a voluntary undertaking by parties to a contract. The Implied Covenant ensures that the parties' agreement is interpreted to further their intentions at the time of contracting and to protect their reasonable expectations arising from their agreement.

INTRODUCTION

Because states generally cannot regulate airlines, one potentially dispositive issue in this case is whether the Implied Covenant is part of a voluntary agreement between contracting parties or, instead, subjects their agreement to a state's non-contractual public policy.

Petitioners Northwest, Inc. and Delta, Inc. (together, "Northwest") are mistaken when they argue that the Implied Covenant is based on state policy encompassing "community standards of decency, fairness, or reasonableness." Pet. Br. at 24. (citation omitted). To the contrary, the Implied Covenant is a self-imposed undertaking that

effectuates the intentions of parties and protects their reasonable expectations arising from the agreement. In other words, the Implied Covenant is part of and helps to define the parties' agreement: it does not enlarge or expand it.

ARGUMENT

I. The Implied Covenant is a Self-Imposed Contractual Undertaking.

A. The Implied Covenant Serves in Aid and Furtherance of the Parties' Express Agreement.

The Implied Covenant makes explicit an obligation implicit in the parties' express agreement. *Cf.* Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 Iowa L. Rev. 1, 4-5 (1981) (comparing good faith with *pacta sunt servanda*). Its historical roots lie in ordinary implied promises cases starting in the 1870s, such as those involving conditions of satisfaction and requirements or output contracts. Steven J. Burton & Eric G. Andersen, *Contractual Good Faith: Formation, Performance, Breach and Enforcement* 23-27 (1995). The judicial practice of implying contract terms expanded greatly following Judge Cardozo's famous opinion in *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (1917) ("[A] promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed."). For some time, courts implied terms ad hoc, but starting in 1933 the practice of implication came to be positioned under the rubric of the Implied Covenant. Burton & Andersen, *supra* at 32-33 (discussing *Kirke La Shelle Co. v. Paul Armstrong*

Co., 188 N.E. 163 (1933) (holding that every contract includes an implied covenant of good faith and fair dealing)).

Under Minnesota law, the Implied Covenant "does not extend to actions beyond the scope of the underlying contract[,]" *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 503 (1995), nor can it override the express terms of an agreement, *see* Burton & Andersen, *supra* at 63-65. Indeed, the Implied Covenant cannot form the basis for an independent cause of action. *Medtronic, Inc. v. ConvaCare, Inc.*, 17 F.3d 252, 256 (8th Cir. 1994) ("Minnesota does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing separate from the underlying breach of contract claim."). Further emphasizing that a claim for breach of the Implied Covenant is an ordinary claim for breach of contract in Minnesota, the remedies for its breach are the same as for any other contract claim. *See Wild v. Rarig*, 234 N.W.2d 775, 790 (Minn. 1975); Burton HLR, *supra* at 374 n.21 (showing that remedies in bad faith performance cases are the same as those awarded for "any garden variety breach of contract").

The Implied Covenant is needed because express agreements are commonly incomplete expressions of the parties' agreement. The parties may not state the obvious, such as that one of them may not prevent the other from performing its obligation. For example, a frequent flyer agreement might provide that the airline will credit miles only if it receives the member's ticket stubs at a certain postal box within 30 days of a trip. If the airline closes the box and leaves no forwarding information,

it would breach the Implied Covenant. *See Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984) (holding the good faith covenant was breached when one party unjustifiably hindered the other party's performance); *see also J.J. Brooksbank Co. v. Budget Rent-a-Car Corp.*, 337 N.W.2d 372, 376-77 (Minn. 1983) (holding the Implied Covenant preserved the parties' original bargain in the face of unexpected technological change (citing Burton HLR, *supra* at 380 n.44)); *Nodland v. Chirpich*, 240 N.W.2d 513, 516 (Minn. 1976) (holding that the Implied Covenant was breached when a party attempted to take advantage of the failure of a certain condition precedent, but the party itself was responsible for that failure).

In some cases, the parties' express agreement is incomplete because it leaves one of them discretion to determine its or the other party's contractual obligations. Such discretion must be exercised in good faith. *See* Burton HLR, *supra* at 380-85 (discussing discretion in performance as *the* occasion on which courts invoke the Implied Covenant); *White Stone Partners, LP v. Piper Jaffray Cos.*, 978 F. Supp. 878, 882 (D. Minn. 1997) ("[I]t is this Court's judgment that the Minnesota Supreme Court would require a party to exercise good faith in exercising an *unlimited* discretionary power over a term of the contract if necessary *to effectuate the parties' intent and to save a contract from being held to be illusory*." (emphasis added)). In other words, the Implied Covenant does not create "new" obligations outside the scope of a contract. *See, e.g., Hennepin Cnty.*, 540 N.W.2d at 503; *Cardot v. Synesi Group, Inc.*, A07-1868, 2008 Minn. App. Unpub.

LEXIS 1086, at *22 (Minn. Ct. App. 2008) (citing Burton HLR, *supra* at 371).[2]

In sum, claims for breach of the Implied Covenant are routine breach of contract claims. Like any other implied terms, they aim to implement the parties' intentions or to protect their reasonable expectations *arising from their voluntary undertakings*. The implied covenant does not "enlarge or expand the parties' bargain." It helps to define *what their bargain was*.

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[2] Setting aside insurance contracts, the Implied Covenant is part of contracts throughout the United States. As the California Supreme Court put it:

> Allegation of breach of the implied covenant of good faith and fair dealing is an allegation of a breach of an "ex contractu" obligation, namely, one arising out of the contract itself. The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes.

Foley v. Interactive Data Corp., 765 P. 2d 373, 394 (Cal. 1988). Similarly, the New York Court of Appeals has written that the covenant of good faith and fair dealing "serves in aid and furtherance of other terms of the agreement of the parties." *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 91 (N.Y. 1983).

B. The Implied Covenant is Not Like the Unconscionability Doctrine.

Because the Implied Covenant serves only to effectuate the parties' intentions and to protect their reasonable expectations arising from their agreement, Northwest and the United States are mistaken when they equate the Implied Covenant with the unconscionability doctrine. *See* Pet Br. at 26; U.S. Br. at 17. Unconscionability gives the courts a power to refuse to enforce an agreement when the agreement was not a product of meaningful choice when it was made, and the agreement is so one-sided in its terms as to shock the conscience. *See* Uniform Commercial Code § 2-302, cmt. 1; *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-450 (D.C. Cir. 1965).

The Implied Covenant, by sharp contrast, ensures that parties to an enforceable agreement get what they intended or reasonably expected when performance time arrives. The Implied Covenant is relevant only to the performance or enforcement of a contract, not to its formation. Restatement (Second) of Contracts § 205 & cmt. c (1981) ("This section, [like the U.C.C.], does not deal with good faith in the formation of a contract"). The Implied Covenant, moreover, has nothing to do with meaningful choice or one-sided terms. *See* Burton & Andersen, *supra* at 50; Burton HLR, *supra* at 383-84 ("Unlike the unconscionability doctrine, . . . weakness and strength in this context do not refer to the substantive fairness of the bargain or to the relative bargaining power of the parties. Good faith performance cases typically involve arm's-length

transactions, often between sophisticated business persons" (footnote omitted)).

C. Northwest Misconstrues Minnesota Law and the Restatement.

Northwest asserts that Minnesota law defines bad faith performance to "exclude a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Pet. Br. at 24. In support of this proposition, Northwest cites *Hennepin Cnty.*, 540 N.W.2d at 502, which cites Restatement (Second) of Contracts § 205 (1981).

This is misleading for two reasons. First, *Hennepin County* cited to Section 205, which says only that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1981). Northwest is relying instead on a comment to the Restatement, never cited or endorsed by the Minnesota Supreme Court.

Second, Northwest quotes the "community standards" phrase out of context. It is preceded by language with a strikingly different import: "[g]ood faith performance . . . of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.*, cmt. a (1981). As a whole, the sentence is best read to emphasize agreed common purposes and justified expectations; "community standards of decency, fairness or reasonableness" are *examples* of what contract parties might reasonably

expect from their counterparties when they make their contracts.

II. "Sole Judgment" in Northwest's Frequent Flyer Agreement Does Not Make Good Faith an Enlargement of the Agreement

Northwest argues that the express term "sole judgment" in its frequent flyer agreement means that Northwest has absolute and unlimited power to terminate Ginsberg's rights. *See, e.g.*, Pet. Br. at 22. Consequently, Northwest suggests, any other interpretation enlarges or enhances the agreement "based on laws or policies external to the agreement." Pet. Br. at 22-23. Northwest is mistaken here, as Minnesota law and Professor Burton's scholarship establish: a contract consists of both express and implied terms, consequently, there is no conflict between "sole judgment" and a good faith constraint on discretion. *See Jack v. Horman*, A06-362, 2007 Minn. App. Unpub. LEXIS 34, at *7-8 (Minn. Ct. App. Jan. 9, 2007) (emphasis added) ("Although the contract gave the [defendants] *sole* discretion, it did not give them unlimited discretion. . . . [Defendants] had an obligation to exercise that discretion in good faith."); *see also White Stone Partners*, 978 F. Supp. at 881 ("[T]he implied covenant may not be applied to limit the exercise of a clear contractual provision . . . .").

Put another way, whether a party used its discretion in "bad faith" does *not* depend on public policy; it depends instead on whether the party acted for reasons it gave up when it entered the contract. Burton & Andersen, *supra* at 45-52; Burton HLR, *supra* at 384-85. This is where the Implied Covenant

is tied to the parties' voluntary undertaking (i.e., their agreement). Some reasons for exercising discretion may be within their intentions and expectations; others may be outside of them. Good faith requires a party to exercise contractual discretion for a reason within them. Burton & Anderson, *supra* at 51-57.

The above constraint does not negate the contractual term "sole judgment;" rather, it allows for a deferential review for abuses of discretion, those uses that undermine contractual intentions and expectations. The contract in this case provided that Northwest could exercise its "sole judgment" to determine whether Ginsberg abused the frequent flier program. But Northwest could not terminate him "for any reason whatsoever, no matter how arbitrary or unreasonable." *Tymshare, Inc. v. Covell,* 727 F.2d 1145, 1154 (D.C. Cir. 1984). In particular, Northwest almost certainly cannot terminate him for reasons related solely to its merger with Delta; that would have nothing to do with an abuse of the program.

In *Tymshare,* then-Judge Scalia expressed concern that some courts may interpret "good faith" as representing "considerations of morality and public policy." 727 F.2d at 1152-53. Professor Burton's scholarship establishes that any such court would be in error, and that few courts make such a mistake. Burton HLR, *supra* at 371.[3] Most

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[3] The Brief for Petitioners cites Professor Burton's work for "observing that the "*Restatement*-Summers formulation ... implies a ground for judicial decision that lies outside of and may take precedence over the

Footnote continued on next page

importantly for present purposes, the courts of Minnesota take Professor Burton's view and do not consider the Implied Covenant to be based on public policy. *See, e.g., J.J. Brooksbank Co.*, 337 N.W.2d at 76-77 (citing Burton HLR, *supra* at 380 n.44); *Allen v. Thom*, 2008 Minn. App. Unpub. LEXIS 844, at *10-11 (Minn. Ct. App. 2008) (unpublished) (citing Burton HLR, *supra* at 371); *Cardot*, 2008 Minn. App. Unpub. LEXIS 1086, at *22-23 (unpublished) (citing Burton HLR, *supra* at 371); *accord, e.g., Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 193 (NH 1989) (Souter, J.) ("[T]he parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion.").

III. The District Court's Dismissal of Respondent's Claim for Breach of Contract Does Not Foreclose His Claim for Breach of Implied Covenant.

Ginsberg's Complaint asserted separate claims for "breach of written contract" and for "breach of the duty of good faith and fair dealing." (Compl. at 14-17.) The District Court dismissed both. Respondent appealed only the dismissal of the claim for breach of the Implied Covenant. As Amicus Curiae, the United States supports reversing the Court of Appeals because the District Court's

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Footnote continued from previous page

agreement of the parties." Pet. Br. at 26 (citing Steven J. Burton, *More on Good Faith Performance of a Contract: a Reply to Professor Summers*, 69 Iowa L. Rev. 497, 499 (1984)). Petitioners did not reveal that Professor Burton was *disputing* that view.

decision on the breach of contract claim, though it "may" be erroneous, forecloses the good faith covenant claim. U.S. Br. at 18-20; *see also* Pet. Br. at 23, 27. The United States, however, is mistaken.

The District Court dismissed the express breach of contract claim because the claim alleged that "the defendants have failed to perform in accordance with the Program contract, revoking the Program status of plaintiff and Class members *without valid cause*." (Compl. at ¶ 49 (emphasis added).) The District Court thought Ginsberg was asking the court to "replace Northwest's judgment with [the district court's] own regarding what counts as 'abuse' of WorldPerks." (App-72.) Plainly, a district court could never properly act in such a fashion.

A claim for breach of the Implied Covenant, however, does not ask a district court to replace one party's judgment with the court's. The Implied Covenant allows no one to substitute their judgment for that of a contract party with discretion, as though a contract party's exercise of discretion were subject to de novo review. Rather, review is deferential. A court may find a party in breach of the Implied Covenant only for using its discretion for reasons that are impermissible *due to the agreement*. The trier of fact might, for example, find that Northwest terminated Ginsberg's WorldPerks status for business reasons related to its merger with Delta. This would be a finding that Northwest did not make a judgment about abuse of the WorldPerks program *at all*. That would be a breach of contract.

So understood, the District Court's decision on Ginsberg's claim for breach of the written contract

does not foreclose his claim for breach of the Implied Covenant. The District Court's decision held only (and properly) that it could not conduct a "de novo" review of Northwest's judgment. This does not affect whether Northwest acted for reasons barred by the Implied Covenant; i.e., reasons that are barred by the parties' voluntary undertakings.

CONCLUSION

For the aforementioned reasons, Amicus Curiae Steven J. Burton respectfully submits that the implied covenant of good faith and fair dealing serves to effectuate the self-imposed contractual undertakings of the parties.

RESPECTFULLY SUBMITTED,

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NORTHWEST, INC., et al.,

Petitioners,

v.

RABBI S. BINYOMIN GINSBERG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CALIFORNIA, HAWAII, ILLINOIS, INDIANA, IOWA, MAINE, MARYLAND, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, RHODE ISLAND, TENNESSEE, VERMONT, AND WYOMING AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE AMICI CURIAE

Amici states share a compelling interest in ensuring that the Airline Deregulation Act of 1978 (ADA) does not preempt important common law remedies when airlines fall short on their voluntary undertakings. Contract law historically has been a state concern. As this Court recognized in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995), there is no indication that Congress sought to supplant the traditional state function of providing a forum for resolving contractual disputes concerning the airlines.

The States also share a compelling interest in ensuring that ADA preemption remains properly tied to the airlines' core business of moving passengers and cargo. Overly aggressive judicial interpretation of the ADA stymies states' legitimate regulatory and enforcement efforts. *See, e.g.*, Reporter's Transcript of Proceedings at 20-23, *People v. Delta Air Lines*, No. CGC-12-526741 (Cal. Super. Ct. May 9, 2013) (holding preempted consumer-protective state privacy laws as applied to Delta Air Lines' mobile phone application); *Huntleigh Corp. v. La. State Bd. of Private Sec. Exam'rs.*, 906 F. Supp. 357 (M.D. La. 1995) (holding preempted Louisiana's Private Security Regulatory and Licensing Law as applied to independent contractor performing security screening at airports). This case provides an opportunity for the Court to further refine the line between prohibited and permitted state regulatory efforts in a manner that leaves the States free to regulate functions that bear

too attenuated a connection to prices, routes, and services to fall within the ADA's ambit.

SUMMARY OF ARGUMENT

1. Respondent's implied covenant claim survives preemption because it is not a "law, regulation, or other provision having the force and effect of law," but instead operates to effectuate the contracting parties' intentions with respect to their voluntary undertakings. *See* 49 U.S.C. § 41713(b)(1). This understanding of the doctrine is supported by both its origins and the modern case law applying it. The Court should apply the analysis of *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), to the implied covenant claim and other contract law doctrines that operate to enforce the airlines' contractual agreements.

Variation in the outcome of cases applying the implied covenant is a function not of the covenant, but rather of the differing approaches used by states in pursuing the single goal of divining party intention. Some states rely on the four corners of the agreement. Others use multiple doctrines, such as the implied covenant, that look outside the four corners of the contract to determine the parties' intentions. Eliminating use of the implied covenant in the ADA context would effectively, and inappropriately, take sides on how state courts should construe contracts that implicate airline services.

2. To the extent that Ginsberg's claims are based on the complete revocation of his frequent flyer membership, a premise of the Ninth Circuit's opinion, his claims survive preemption for the independent reason that they do not "relate[ ]" to the "price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). Frequent flyer program members commonly accrue, and redeem, substantial mileage credits without ever setting foot on a plane. Through agreements with credit card issuers, mortgage lenders, and various merchants, airlines have created a virtual marketplace in which actual flight mileage plays only a supporting role. The tight nexus that Petitioners posit between frequent flyer programs and airlines' "price, route, or service" does not exist. *Wolens* therefore does not dictate the result here because, unlike this case, it involved exclusively flight-related components of American Airlines' frequent flyer program.

The attenuated relationship between frequent flyer programs, on the one hand, and "rate, route, or service," on the other, should not be controversial to the airlines. The airlines themselves often invoke state law in their own private suits targeting wrongdoing in frequent flyer programs, against both parties with whom they contract and parties with whom they lack contractual privity. But, as this Court has explained, a petitioner invoking preemption "cannot have it both ways" – "[i]t cannot rely on [a state] regulatory framework . . . yet argue that [respondent's] claims, invoking the same state-law regime,

are preempted." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1781 (2013).

In this case, however, remand may be appropriate in light of an ambiguity in the record: while the Ninth Circuit's opinion was premised on total revocation of Ginsberg's membership, there is a suggestion in the record and briefs that only Ginsberg's Platinum Elite status was revoked. Because the record does not show how that status is accrued or what benefits it may bestow, remand may be required to ascertain its nexus with the airline's prices, routes, or services.

ARGUMENT

I. Implied-Covenant Claims Are Not Preempted Under the ADA Because They Operate to Effectuate the Parties' Voluntary Undertakings as Contemplated by *Wolens*

The implied covenant of good faith and fair dealing operates to give effect to the intentions of contracting parties. Claims based on an implied covenant therefore survive ADA preemption under a straightforward application of *Wolens*. Under *Wolens*, enforcing parties' self-imposed contractual obligations is consistent with the ADA's purpose of putting maximum reliance on the competitive marketplace. 513 U.S. at 230.

To be sure, as Petitioners and their amici emphasize, implied-covenant claims may come out different

ways in different states. But such variations result from the different contract interpretation doctrines used by states to determine the parties' intentions rather than from any peculiarity in the implied covenant. And while a few outlier states may have approaches to the implied covenant that differ from the norm, such minimal variation falls well within the limits the Court has prescribed and Congress has sanctioned in ADA and other related doctrinal areas.

A. The Implied Covenant Operates to Give Effect to the Intent of the Parties to a Contract

The implied covenant of good faith and fair dealing is one of several doctrines developed by courts as part of a move away from a formalistic approach to contract construction, which focused exclusively on the text of a contract, toward the modern approach, which seeks to give effect to the contracting parties' true intentions. So understood, the implied covenant is a means for holding parties to the terms of their bargain – the precise goal recognized as surviving preemption under *Wolens*.

Under the formalist approach of the early Nineteenth Century and the First Restatement of Contracts, courts would strictly construe contract language, sometimes even to the detriment of the actual intent of the parties. *See* Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 Geo.

L.J. 195, 196-97 (1998); Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 Wm. & Mary L. Rev. 1223, 1232-36 (1999). Under criticism from prominent Realists such as Arthur Corbin and Karl Llewellyn, and following the lead of state courts in New York and California, the trend reversed. Ross & Tranen, *supra*, at 200-04. By the end of the Nineteenth Century, courts began to rely increasingly on extrinsic evidence to discern the intent of the parties. Van Alstine, *supra*, at 1236-37. Courts recognized that writings often imperfectly reflect parties' intentions, as it is difficult to anticipate every possible eventuality in writing. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 Colum. L. Rev. 1416, 1433 (1989). Many courts therefore abandoned their "absolute confinement to the words of an express contract" and developed methods to address events not contemplated by the parties. *N. German Lloyd v. Guar. Trust Co. of N.Y.*, 244 U.S. 12, 22 (1917). Courts today show "an increasing willingness to 'consider the entire relationship of the parties, and to find that facts and circumstances establish a contract.'" *Foley v. Interactive Data Corp.*, 765 P.2d 373, 386 (Cal. 1988) (citation omitted).

As part of the modern (now more than century-old) approach to contract enforcement, state courts and legislatures have adopted various methods to determine the parties' actual intent. Default rules have been developed for specific contexts in which the parties themselves do not specify terms. For example, the Uniform Commercial Code (U.C.C.) sets out rules

for determining the price of goods, U.C.C. § 2-305 (2012), place of delivery, *id.* § 2-308, time for shipment, *id.* § 2-309, and risk of loss depending on circumstances, *id.* § 2-509, in contracts involving the commercial transfer of goods, when the contract itself does not so specify. Some doctrines excuse performance altogether when circumstances occur that were not within the parties' contemplation, such as "contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing." *N. German Lloyd*, 244 U.S. at 22; *see Chicago, M. & St. P. Ry. Co. v. Hoyt*, 149 U.S. 1, 15 (1893) (doctrine of impossibility); *see generally* Restatement (Second) of Contracts §§ 261-270 (1981). Other doctrines allow the use of extrinsic evidence to show the parties' intent in case of unforeseen circumstances. *See* 30 R. Lord, *Williston on Contracts* § 77:1 (4th ed. 2004) (doctrines of impracticality and frustration of purpose).

States uniformly deploy these doctrines to determine party intent. To be sure, some variation exists among the States as to which doctrines they recognize and how the doctrines are applied. Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 Yale L.J. 926, 928 n.1 (2010). Such variation is a healthy product of our federalism, wherein the States may operate, within constitutional and federal constraints, as laboratories for social, political, and legal ideas. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980). That such variation exists does not undermine the *unitary purpose* of the pursuit: to

ascertain the intent of the parties to contracts so that they may be held to their bargain.

Like other doctrines developed in the late-Nineteenth Century, the implied covenant was developed to admit evidence outside the four corners of a contract to prove the terms of the bargain, and to ascertain and effectuate the parties' intentions. *See* Steven J. Burton & Eric G. Andersen, *Contractual Good Faith* § 1.1, at 3 (1995). Scholars trace this doctrine's origins in part to then-Judge Cardozo's opinion in *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214-15 (1914), which rejected contract law's "primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal . . . ," and instead attempted to divine what "both parties must have intended." *See* Burton & Andersen, *supra*, § 2.2.2.1, at 30; Van Alstine, *supra*, at 1241. The covenant was invoked most often in output and requirement contracts (where a party contracts to consume as much as the other party produces or supply as much as the other party requires); satisfaction contracts (where a party's obligation is conditioned on the other party's satisfaction); and contracts that confer sole discretion on one party, such as the agreement at issue in this case. *See* Burton & Andersen, *supra*, § 2.2.1, at 23-29.

In practical terms, when one party to a contract violates reasonable contractual expectations, the other party may bring suit alleging a breach of the covenant as part of a breach of contract action; an independent cause of action; or, rarely, in the insurance

context, as an action in tort, depending on the circumstances. Burton & Andersen, *supra*, § 4.3.1, at 121 & § 9.1, at 392. However the covenant is pleaded, the vast majority of courts applying the doctrine look to the parties' reasonable expectations based on the context of their agreement, and find the covenant to be violated only when these expectations are not met. *Id.* This, as Respondent explains, is precisely how the implied covenant claim operates in this case – to ascertain the parties' understanding of the meaning of a term, "sole judgment," in their written agreement. Resp. Br. 22-25.

Although some early cases used the covenant to apply state public policies, courts soon retreated from this approach, using the covenant merely as a tool to reconstruct the parties' intentions, and thereby, the meaning of the contract. Despite some outliers, as the only treatise on the covenant explains: "The now-considerable case law . . . regularly construe[s] good faith to protect and serve the parties' justified expectations arising from their agreement." Burton & Anderson, *supra*, § 2.1, at 21; *see also* Van Alstine, *supra*, at 1275-76 ("[T]here is now substantial agreement that the doctrine of good faith performance protects the 'reasonable' or 'justified' expectations of the contracting parties."). A multistate survey confirms that, with few exceptions,[1] state courts anchor

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[1] Only one state appears to be an outlier, explicitly using the covenant to effectuate public policy. *See Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 844 (Alaska 2010) (While the covenant

(Continued on following page)

the covenant to the contract and the parties' expectations. *See* App. A (collecting cases).

B. The Implied Covenant Does Not Cause Disuniformity That Would Undermine the ADA's Purposes

1. Variation in outcomes among states in cases involving the implied covenant is not a product of the covenant but occurs, rather, because different states take different approaches to ascertaining party intent, even as they agree that party intent controls construction of contracts. Thus, some courts adopt a formalist approach, focusing exclusively on the four corners of the written agreement. Others use doctrines, such as the implied covenant, to allow context to give meaning to the agreement's text when ambiguities and disputes arise. As the covenant rises and falls with these other doctrines, disallowing application of the covenant in the ADA context would effectively impose a single rule for all state courts on how to construe contracts whenever airline services are involved.

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is based on the parties' bargain, "[a]n employer also breaches the objective component of the covenant by terminating an employee on unconstitutional grounds or for reasons that violate public policy."). Certain other states apply only statutorily defined good faith in limited contexts. *See, e.g.*, *Niedojadlo v. Cent. State Moving & Storage Co.*, 715 A.2d 934, 937 (Me. 1998). As explained below, the existence of a few outliers do not establish a basis for broad preemption.

State courts treat the implied covenant as they would any other tool to reconstruct party intentions. Thus, in jurisdictions where courts take a more formalist approach, they reject many doctrines, including the implied covenant, which otherwise would permit the court to look beyond the contract's express language in determining parties' intent. *Compare Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 857-58 (Minn. 1986) (covenant not read into employment contracts) *with Hruska v. Chandler Associates, Inc.*, 372 N.W.2d 709, 712-14 (Minn. 1985) (rejecting the use of parol evidence to determine meaning of employment contract). Other jurisdictions, such as California, where courts look beyond the four corners of the contract to determine meaning, are more receptive to implied covenant claims that reasonable expectations have been violated. *Foley*, 765 P.2d at 386-87.

Thus, when Petitioners and the United States target implied covenant cases in different states for yielding different outcomes, their quarrel is with any doctrine that considers context relevant in ascertaining and effectuating the parties' intentions. For example, the varying outcomes in the at-will employment cases, which Petitioners and the United States so roundly criticize, result not from the implied covenant but from the differing evidence different courts use to divine party intent in the absence of a written agreement. *See* Pet. Br. 33-34; Brief of the United States as Amicus Curiae Supporting Reversal (U.S. Br.) at 27. California courts, among many others,

"consider the entire relationship of the parties . . . [F]actors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement." *Foley*, 765 P.2d at 386-87 (internal quotation marks omitted). As a result, when no written contract exists, rather than conclude that the employee is at-will, California courts may take into account contextual information, such as termination conditions set forth in an employment manual, to conclude that the employer's discretion to terminate is limited. *Id.* By contrast, the Alabama Supreme Court has held that an employee handbook distributed by the employer does not alter the at-will nature of employment under the common law when no written contract exists. *White v. Chelsea Indus., Inc.*, 425 So. 2d 1090 (Ala. 1983). It is these different approaches to interpreting employment terms in the absence of a written contract, and not the implied covenant, that produces the varying outcomes in this context. *See* Theresa Ludwig Kruk, *Right to Discharge Allegedly "At-Will" Employee as Affected by Employer's Promulgation of Employment Policies as to Discharge*, 33 A.L.R.4th 120 (1984).

Thus, targeting the implied covenant "assumes the answer to the very contract construction issue," by seeking to bind the state courts to a particular approach to interpreting the intentions of the parties in the ADA context that some courts (including this Court) have rejected. *Wolens*, 513 U.S. at 234; *see Whitney v. Wyman*, 101 U.S. (11 Otto) 392, 396 (1880) ("Words are merely the symbols [contracting parties]

employ to manifest their purpose. . . ."). The better view is that the ADA leaves states with the responsibility to develop doctrine for "sensible construction" of contracts. *Wolens*, 513 U.S. at 230.

2. In any event, this Court has never required unwavering uniformity of state interpretative methods, whether in this context, or in the context of the Employee Retirement Income Security Act (ERISA), upon whose judicial precedents this Court's ADA preemption analysis has frequently relied. In the ADA context, despite the States' varying approaches to contract construction, *Wolens* concluded that "contract law is not at its core 'diverse, nonuniform, and confusing.'" 513 U.S. at 233 n.8 (citation omitted). In the ERISA context, this Court has differentiated between unworkable diversity in state laws designating beneficiaries of an intestate plan participant, and relatively uniform state laws prohibiting a person who has killed a plan participant from inheriting from the participant. The Court explained that slayer statutes "have been adopted by nearly every State . . . and are more or less uniform nationwide," *Egelhoff v. Egelhoff*, 532 U.S. 141, 152 (2001), even though there are at least "three approaches" to addressing the problem. Michael G. Walsh, *Homicide as Precluding Taking Under Will or by Intestacy*, 25 A.L.R.4th 787 (1983).

Accepting reasonable variations among state laws reflects a common-sense understanding that slight differences will often occur, and be tolerable, when Congress enacts federal laws. Unless the Court

wishes "to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, . . . contract claims relating to airline rates, routes, or services," *Wolens*, 513 U.S. at 232, it should leave to state courts the task of interpreting the parties' intentions.

II. An Airline's Decision to Revoke a Customer's Membership in a Frequent Flyer Program Does Not "Relate" to the "Price" or "Service" of an Airline Carrier

The Ninth Circuit's holding that a claim based on "revocation" of "membership" in a frequent flyer program does not "relate" to price, routes or services, provides an independent ground for Ginsberg's claim to proceed. Pet. App. 3. The accrual and redemption of "points" or "miles" in frequent flyer programs is too attenuated from airline transportation to implicate the ADA's deregulatory concerns. Petitioners' and their amici's suggestions that frequent flyer programs are wholly within the ADA's preemptive scope are wrong; those arguments misread *Wolens* and fail to account for the evolution in and expansive reach of modern frequent flyer programs.

We note, however, that the briefing in this Court indicates that Northwest's action may have been limited to terminating Ginsberg's Platinum Elite status, rather than complete termination of his membership or revocation of his accrued points. Pet. Br. 2, 7. If that is the case, and should this Court also hold that

the implied covenant is regulatory in nature (*see* Part I, *supra*), then remand may be appropriate so that the lower courts can consider the relationship of the Platinum Elite status to airline rates, routes and services.

A. The Ninth Circuit's Holding, Which Was Premised on "Revocation" of Respondent's WorldPerks' Membership, Is Correct

The Ninth Circuit correctly held that, as a general matter, revocation of frequent flyer membership is insufficiently connected to the price, route, or services of an airline carrier to be preempted. The premise of the Ninth Circuit's holding was total membership revocation: "Northwest revoked Ginsberg's WorldPerks membership on June 27, 2008." Pet. App. 3. Because modern frequent flyer programs have only a tenuous connection to airline prices, routes, and services, this holding was correct. *See Pelkey*, 133 S. Ct. at 1778.

1. The market for airline points has evolved in the 18 years since *Wolens* was decided. Frequent flyer programs have changed from plans centered on air travel to free-floating businesses that may not involve flights at all.

Northwest was one of the first airlines to launch a frequent flyer program in 1981 – the Orient Free Flight Plan, known as WorldPerks from 1986 onwards. *The Big 2-5 – Celebrating 25 Years of Frequent*

Flyer Programs, InsideFlyer (Apr. 24, 2006).[2] When they were first introduced, frequent flyer programs – including Northwest's early program – centered around airline travel and often had restrictive rules for that travel. *Id.* For example, in the first major program offered by American Airlines, tickets were only discounted, and not offered free; miles were non-transferable. *Id.* Airlines developed award relationships with other travel-related entities such as hotels and car rental agencies, such that purchases at these entities would garner miles. But, at least until the late 1980s, customers earned miles primarily when they traveled. *Id.*

The close ties between airline services and frequent flyer programs began to unravel when frequent flyers began to earn many of their miles without setting foot on an aircraft, and the proportion of miles spent on flights decreased. In the late 1980s, airlines began developing relationships with non-travel-related entities, such as credit card companies, to allow members to earn miles without traveling. *Credit Card Competition*, InsideFlyer (Jan. 2011).[3] Northwest, for example, began offering miles for credit card purchases in 1988. *Bank One, Northwest Airlines Offer Visa Card To Worldperks Members*, PR Newswire (Feb. 22, 1988). Later that year, signing up with MCI for phone services would also garner members WorldPerks

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[2] *Available at* http://www.insideflyer.com/articles/o2.php?key=89.

[3] *Available at* http://www.insideflyer.com/articles/article.php?key=6670.

miles. *Northwest Joins With MCI In Frequent-Flier Venture*, The Associated Press (June 14, 1988).

At first these alternate sources offered limited miles, but today they are the dominant means by which miles are obtained. For example, in the late 1980s, one obtained only 5,000 bonus miles for obtaining a new credit card. *Credit Card Competition, supra*. However, by 2009, credit cards were offering up to 100,000 miles to sign up. Today, "[t]he majority of airline frequent flier miles are now earned outside an airplane, by frequent buyers [rather] than frequent flyers. Airline miles are earned for the use of credit cards, hotel stays, car rentals, retail purchases[,] dining out, and even for mortgage and real estate agents. . . . [T]hree times more airline miles are being generated than are being consumed." Pankaj Narayan Pandit, Infosys, *Perspective: Airline Loyalty Programs* 1 (2009).[4] Indeed, "if you pay by credit card you can earn miles for hospital surgery, income-tax payments and funerals." Special Report, *Frequent-Flyer Miles: Funny Money*, The Economist (2005).[5] As one promotion proclaims, "[a]ccumulating miles is no longer reserved for individuals who

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[4] *Available at* http://www.infosys.com/industries/airlines/Documents/frequent-flyer-programs.pdf (accessed July 25, 2013) (copy on file with counsel). Most of the sources Petitioners cite, that discuss the relationship between frequent flyer programs and air travel do not date past the early 1990s. *See* Pet. Br. *passim*.

[5] *Available at* http://www.economist.com/node/5323615.

travel." *Frequent Flyer Miles: Turning Mortgages Into Miles*, Business Week Special Advertising Section.[6]

Not only are most miles *earned* without consuming airline services, many miles are *spent* without consuming airline services, and most miles are *not spent at all* because of the very practices this Court encountered in *Wolens*. Pandit, *supra*, at 1. Through airlines' own actions, the spending of miles on the flight-related services that the ADA protects has been discouraged. "Airline revenue management is programmed to discourage sale of free seats or upgrades using redemption of miles." *Id.* at 2. "[O]n stingier airlines like Northwest," the redemption rate is even lower – "the average success rate of getting an upgrade or free ticket using miles" is 37 percent. *Id.* (citing *Funny Money*, *supra*). At the same time, frequent flyer programs provide marketplaces in which customers may obtain rewards that do not comprise airline services: Northwest-Delta's program allows consumers, for example, to buy Omaha steaks or tickets to Broadway shows, or to contribute to charities, among hundreds of other options. *See* Delta, SkyMiles Marketplace.[7]

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[6] http://www.businessweek.com/adsections/extravel/frequent/mortgages_flyer.htm (last accessed Aug. 25, 2013).

[7] https://marketplace.delta.com/ (last accessed July 30, 2013). After the merger of Northwest and Delta airlines, WorldPerks miles were converted into Delta SkyMiles. Charline King, *Delta and Northwest Skymiles and WorldPerks Merge*, Examiner.com

(Continued on following page)

In turn, airlines earn profits from their mileage program, not through providing airline services, but rather by selling their miles to partners, who in turn award the miles to frequent flyer members in connection with various non-travel-related transactions. Airlines may earn one or two cents per mile awarded, which can amount to four cents for each dollar a consumer spends when multiple miles are awarded per dollar. *See* Chase, United MileagePlus Explorer Credit Card.[8] One 2005 estimate put the revenue from non-airline-service-related sales at $10 billion. *Funny Money*, *supra*. Thus, "airline loyalty programs [are] . . . run as independent profit centers." Pandit, *supra*, at 1. The independence is not just figurative – airlines have begun spinning off their programs as separate businesses altogether from that of providing air services. Evert de Boer, Carlson Marketing, *Spinning of Frequent Flyer Programs in Turbulent Times* (2009).[9]

To be sure, some program benefits are still tied to flights. For example, some programs offer elite program status that may only be accrued through miles flown (i.e., rather than through credit card use or the

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(Oct. 9, 2009), *available at* http://www.examiner.com/article/delta-and-northwest-skymiles-and-worldperks-merge.

[8] *Available at* https://creditcards.chase.com/credit-cards/united-airlines-credit-card2.aspx?unitedmileageplussplit=2&iCELL=6ZJ4 (last accessed July 29, 2013).

[9] *Available at* http://loyalty360.org/images/uploads/spinning_off_frequent_flyer_programs_in_turbulent_times.pdf.

purchase of merchandise, meals, or services). *See, e.g.*, Delta, Skymiles Medallion Program Details.[10] In some programs, the benefits of elite status relate solely to flight services, such as upgrades, or reduced fees for checking baggage. *See, e.g.*, Delta, Skymiles Medallion Benefits.[11] Thus, disputes involving elite programs may require a different preemption analysis than those involving membership in general frequent flyer programs. The record on Northwest's elite program in this case is undeveloped.

2. Given the attenuated nexus between mileage points accrual and redemption on the one hand, and actual flights on the other, it cannot be said that simple membership in a frequent flyer program – or termination of that membership – is so tied to an airline's core business that it necessarily falls within the ADA's deregulatory purposes.

The ADA's preemption provision is broad, but limited. On one hand, the term "related to" is "'expansive.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987)). On the other, "the breadth of the words 'related to' does not mean the sky is the limit," "else 'for all practical purposes pre-emption

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[10] www.delta.com/content/www/en_US/skymiles/about-skymiles/medallion-program/program-details.html/#mqms (last accessed Aug. 27, 2013).

[11] www.delta.com/content/www/en_US/skymiles/about-skymiles/medallion-program/medallion-benefits.html (last accessed Aug. 27, 2013).

would never run its course.'" *Pelkey*, 133 S. Ct. at 1778 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995)). State regulation that has only a "tenuous, remote, or peripheral" effect on airline prices, routes, or services survives preemption. *Id.* (internal quotations omitted).

Multiple factors confirm that regulation of frequent flyer program membership has too "tenuous, remote, or peripheral" a relationship to airline flights or services to create a preemption problem. As noted above, airline loyalty programs constitute virtual marketplaces that trade in a wide variety of goods unconnected specifically to flights (indeed, Delta calls part of its program the SkyMiles Marketplace). Airlines earn commissions from merchants such as credit card companies to whom they grant access to this marketplace. In that sense, regulating use of airline frequent flyer programs is analogous to regulating use of physical marketplaces through the general zoning laws approved in *Pelkey*, 133 S. Ct. at 1780, rather than regulating the airlines' rates, routes or services. That is, the ADA should not prevent a state from regulating marketplaces, whether physical *or* virtual, regardless of who sets them up, so long as that regulation does not encompass the airlines' core function of providing flights and associated services. "Quality standards . . . set by the State" on, say, the credit lending practices through which points are gained, or the television sets that can be purchased with the points, are not preempted, even if regulation

of these unrelated areas may "affect the relative cost of providing other[ ]" services, such as flights. *Travelers*, 514 U.S. at 660. The link between the program and airline services is too indirect to support ADA preemption of a state law that regulates program access.

The relationship is also attenuated by the negligible effect regulation would have on airline "prices, routes and services." Frequent flyer suits concern access to the (often separate) frequent flyer businesses the airlines run. Protecting access to the programs, however, does not equate to access to *flights*. As *Wolens* held, the airlines retain carte blanche under state law (within contractual limits), to limit how, when, and whether members can spend their frequent flyer points to redeem the flight services that the ADA protects.

3. Petitioners' arguments stretch *Wolens* beyond its reasonable bounds. While *Wolens* indisputably involved a frequent flyer program, it does not support Petitioners' argument that any and all claims regarding frequent flyer programs are preempted by the ADA. Pet. Br. 17-20; U.S. Br. 12-16.

The preemption analysis in *Wolens* turned in part on facts distinctive to that case. In *Wolens*, respondents' claims were based on program changes that impacted the number and availability of needed miles specifically *to purchase flights*. 513 U.S. at 226. There, respondents disputed imposition of capacity controls (limits on eligible seats on flights) and blackout

dates (restrictions on dates for which miles could be redeemed for flights). *Id.* at 225. Thus the claims implicated "rates" because they related to what the airline "charge[d] in the form of mileage credits for free tickets," and the claims implicated "services" because they limited "access to flights." *See id.* at 226.

The factual context of *Wolens* therefore involved only those aspects of a frequent flyer program that were specifically flight-related, and its holding must be understood in that context. Because program membership is not necessarily flight-related, claims based on loss of program membership are not necessarily preempted.

B. Fairness and Law Enforcement Considerations Support a Finding of No Preemption Where the Challenged Conduct Bears Only a Tenuous Connection to an Airline's Core Services

States, their residents, and even airlines themselves, benefit from a careful construction of the ADA that does not overly displace state law. States and their residents share an interest in the viability of state regulation in areas such as environmental protection, transportation for emergency services, professional licensing, privacy, employment discrimination, and contract, that have been challenged as preempted

under the ADA.[12] Reasonable limits upon ADA preemption are necessary to protect diverse and important areas of state law.

Indeed, contrary to the positions they are taking in the present case, the airlines themselves rely on the availability of state law remedies for abuses of their frequent flyer programs, often suing defendants with whom they do not even share a contractual relationship. In these suits, they have invoked breach of contract, tortious interference with business relations, unfair competition, misappropriation, and fraud claims, among other theories, in their efforts to prevent the sale or bartering of mileage credits and other practices involving frequent flyer miles that they deem abusive.[13]

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[12] *See respectively Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 208 (2d Cir. 2011); *Eagle Air Med Corp. v. Colo. Bd. of Health*, 570 F. Supp. 2d 1289, 1290 (D. Colo. 2008); *Huntleigh Corp. v. La. State Bd. of Private Security Exam'rs*, 906 F. Supp. 357 (M.D. La. 1995); *People v. Delta Air Lines*, No. CGC-12-526741, 2013 WL 1951360 (Cal. Super. Ct. May 9, 2013); *Delta Air Lines v. New York State Div. of Human Rights*, 689 N.E.2d 898 (N.Y. 1997).

[13] *See, e.g., Alaska Airlines Inc. v. Carey*, No. 09-35979, 2010 WL 3677783 (9th Cir. Sept. 16, 2010); *American Airlines, Inc. v. American Coupon Exchange, Inc.*, 721 F. Supp. 61 (S.D.N.Y. 1989); *American Airlines, Inc. v. Platinum World Travel*, 717 F. Supp. 1454 (D. Utah 1989), *order modified*, 737 F. Supp. 627 (D. Utah May 7, 1990); *Frequent Flyer Depot, Inc. v. American Airlines, Inc.*, 281 S.W.3d 215 (Tex. Ct. App. 2009), *cert. denied*, 559 U.S. 1036 (2010); *Luxury Travel Source v. American Airlines*, 276 S.W.3d 154 (Tex. Ct. App. 2008).

Some of these claims have been permitted to proceed in the face of preemption challenges on the theory that state law is only "regulatory" in nature when it is being invoked *against*, rather than *by* the airlines. *See, e.g., Alaska Airlines,* 2010 WL 3677783, at *2; *Frequent Flyer Depot,* 281 S.W.3d at 221. This one-sided approach to ADA preemption interpretation is, among other things, inconsistent with this Court's observation in *Pelkey* that:

> [Petitioner] cannot have it both ways. It cannot rely on New Hampshire's regulatory framework as authorization for the sale of Pelkey's car, yet argue that Pelkey's claims, invoking the state-law regime, are preempted.

133 S. Ct. at 1781.

Accordingly, as in *Wolens*, this Court should be wary of invalidating state law doctrines that serve important remedial purposes without challenging or undermining the deregulatory purpose of the ADA.

C. Remand May Be Appropriate Based on Uncertainty in the Record Regarding the Scope of Respondent's Claims and the Characteristics of Northwest's Program

Because the record and briefs suggest that Ginsberg's claim may be more limited than total loss of membership in Northwest's WorldPerks program, remand may be appropriate. The record is uncertain on this potentially outcome-determinative issue.

According to Ginsberg, during the dispute, "he did not know if he had been relegated to a lesser status in the Program, or removed from it entirely." J.A. 41, n.4. However, the last communication from Northwest in the record suggests that Ginsberg remained a member of WorldPerks. *See id.* at 62 (threatening "termination of your WorldPerks account"). The distinction may be material if, for example, the terms of the elite program relate to the airline's price, routes or service in ways that membership in Northwest's general frequent flyer program do not. Accordingly, should the Court not hold the implied covenant exempt from ADA preemption, it should consider remanding the case for further factfinding.

* * *

Enforcement of private contracts is a classic state function that, under principles of federalism and state sovereignty, should not be casually displaced. In this case, Respondent seeks, through his implied-covenant claim, to enforce the bargain he believed he had struck with the airline. As such, his claim does not offend the ADA's deregulatory purposes and should be permitted to proceed. Further, to the extent his claim is premised on revocation of his membership status, it has far too tenuous a connection to the airline's prices, routes, or services, to be preempted. Petitioners' suggestion that all aspects of airline frequent flyer programs, which now bear only a highly attenuated connection to actual flights, are entirely

beyond state regulation is unsupported by the text and purposes of the ADA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated: September 19, 2013

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APPENDIX A

Multistate Survey of State Cases Describing the Covenant of Good Faith and Fair Dealing

- *Sellers v. Head*, 73 So.2d 747, 751 (Ala. 1954) ("Where a contract fails to specify all the duties and obligations intended to be assumed, the law will imply an agreement to do those things that according to reason and justice the parties should do in order to carry out the purpose for which the contract was made.").

- *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1040 (Ariz. 1985) (in applying the covenant, "the relevant inquiry always will focus on the contract itself, to determine what the parties did agree to"), *superseded by statute on other grounds.*

- *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1110 (Cal. 2000) ("The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made.*").

- *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1996) (en banc) ("The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations.").

- *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 788-89 (Conn. 1984) ("Although we endorse the applicability of the good faith and fair dealing principle to employment contracts, its essence is

the fulfillment of the reasonable expectations of the parties.").

- *Allworth v. Howard Univ.*, 890 A.2d 194, 201 (D.C. 2006) ("'Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" (quoting Restatement (Second) of Contracts § 205 cmt. A (1981))).

- *Sepe v. City of Safety Harbor*, 761 So. 2d 1182, 1185 (Fla. Dist. Ct. App. 2000) ("'[T]he implied covenant of good faith and fair dealing is designed to protect the contracting parties' reasonable expectations.'" (citation omitted)).

- *Simmons v. Puu*, 94 P.3d 667, 673 (Haw. 2004) ("'[E]very contract contains an implied covenant of good faith and fair dealing that neither party will do anything that will deprive the other of the benefits of the agreement.'" (citation omitted)).

- *Stuart Enters. Int'l, Inc. v. Peykan, Inc.*, 555 S.E.2d 881, 884 (Ga. Ct. App. 2001) ("The implied covenant of good faith modifies, and becomes part of, the provisions of the contract itself. As such, the covenant is not independent of the contract.").

- *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 824 P.2d 841, 863 (Idaho 1991) ("No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties.").

- *Voyles v. Sandia Mortg. Corp.*, 751 N.E.2d 1126, 1131 (Ill. 2001) ("This principle ensures that

parties do not try to take advantage of each other in a way that could not have been contemplated at the time the contract was drafted. . . .'" (citation omitted)).

- *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 34 (Iowa 2012) ("[T]he covenant does not 'give rise to new substantive terms that do not otherwise exist in the contract.'" (citation omitted)).
- *Estate of Draper v. Bank of Am., N.A.*, 205 P.3d 698, 712 (Kan. 2009) (the covenant prohibits behavior "inconsistent with the justified expectations" of the parties).
- *RAM Eng'g & Constr., Inc. v. Univ. of Louisville*, 127 S.W.3d 579, 586 (Ky. 2003) ("Courts often interpret good faith based on the parties' reasonable expectations of the meaning of the provisions of the contract.").
- *Fontenot's Rice Drier, Inc. v. Farmers Rice Milling Co.*, 329 So. 2d 494, 500 (La. Ct. App. 1976) ("[G]ood faith" forbids "deception and a disappointment of the just expectation and confidence" of the parties).
- *Questar Builders, Inc. v. CB Flooring, LLC*, 978 A.2d 651, 675 (Md. 2009) ("[T]he obligation of good faith and fair dealing requires a party exercising discretion to do so in accordance with the 'reasonable expectations' of the other party." (citing Steven J. Burton & Eric G. Anderson, *Contractual Good Faith: Formation, Performance, Breach, Enforcement* § 2.3.3 (1995))).

- *Chokel v. Genzyme Corp.*, 867 N.E.2d 325, 329 (Mass. 2007) ("The purpose of the implied covenant is to ensure that neither party interferes with the ability of the other to enjoy the fruits of the contract . . . and that, when performing the obligations of the contract, the parties 'remain faithful to the intended and agreed expectations' of the contract." (citations omitted)).

- *Allen v. Thom*, No. A07-2088, 2008 WL 2732218, at *4 (Minn. Ct. App. July 15, 2008) ("This covenant forbids a party to unjustifiably prevent its performance of the contract. . . . '[C]ourts employ the good faith performance doctrine to effectuate the intentions of parties, or to protect their reasonable expectations.'" (quoting Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 371 (1980))).

- *Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992) ("Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party.").

- *Farmers' Elec. Co-op., Inc. v. Missouri Dep't of Corr.*, 977 S.W.2d 266, 272 (Mo. 1998) (en banc) ("It is assumed in every contract that the parties will not avoid their obligations under the contract.").

- *Hardy v. Vision Serv. Plan*, 120 P.3d 402, 405 (Mont. 2005) ("We measure the nature and extent of the obligations of good faith and fair dealing by the parties' justifiable expectations." (citation omitted)).

- *RSUI Indem. Co. v. Bacon*, 810 N.W.2d 666, 674 (Neb. 2011) ("The nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties." (footnote omitted)).

- *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1016 (Nev. 2004) ("[W]hen 'the terms of a contract are literally complied with but one party to the contract deliberately countervenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing.'" (citation omitted)).

- *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 193-94 (N.H. 1989) (Souter, J.) ("[U]nder an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting. . . . [¶] in furtherance of which community standards of honesty, decency and reasonableness can be applied.").

- *Wilson v. Amerada Hess Corp.*, 773 A.2d 1121, 1127 (N.J. 2001) ("[T]he task here is to identify in that context the parties' reasonable expectations.").

- *Sanders v. FedEx Ground Package Sys., Inc.*, 188 P.3d 1200, 1203 (N.M. 2008) ("The implied covenant is aimed at making effective the agreement's promises.").

- *Wieder v. Skala*, 609 N.E.2d 105, 109 (N.Y. 1992) ("'What courts are doing [when an omitted term is implied]', . . . 'whether calling the process "implication" of promises, or interpreting the requirements of "good faith", as the current fashion may be, is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations'" (citation omitted)).

- *Cavendish Farms, Inc. v. Mathiason Farms, Inc.*, 792 N.W.2d 500, 506 (N.D. 2010) ("When one party to a contract 'has the power to make a discretionary decision without defined standards,' the implied covenant of good faith and fair dealing applies to protect the parties' reasonable expectations." (citation omitted)).

- *Andrew v. Power Mktg. Direct, Inc.*, 978 N.E.2d 974, 985 (Ohio Ct. App. 2012) (duty to act in good faith "is 'generally used to effectuate the intentions of the parties or to honor their reasonable expectations' and 'applies when one party has discretionary authority to determine certain terms of the contract.'" (citations omitted)).

- *First Nat'l Bank & Trust Co. v. Kissee*, 859 P.2d 502, 509 (Okla. 1993) ("The common law imposes this implied covenant upon all contracting parties, that neither party, because of the purposes

of the contract, will act to injure the parties' reasonable expectations nor impair the rights or interests of the other to receive the benefits flowing from their contractual relationship.").

- *Hampton Tree Farms, Inc. v. Jewett*, 892 P.2d 683, 693 (Or. 1995) ("[D]uty of good faith and fair dealing. . . . serves to effectuate the objectively reasonable expectations of the parties.").

- *Lajayi v. Fafiyebi*, 860 A.2d 680 (R.I. 2004) (applying covenant of good faith and fair dealing to "'satisfy[ ] the primary intent of the parties'" (citation omitted)).

- *Commercial Credit Corp. v. Nelson Motors, Inc.*, 147 S.E.2d 481, 484 (S.C. 1966) ("'In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.'" (citation omitted)).

- *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 731 N.W.2d 184, 194 (S.D. 2007) ("Ultimately, the duty 'emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.' . . . [¶] 'The implied obligation "must arise from the language used or it must be indispensable to effectuate the intention of the parties."'" (citations omitted)).

- *Dick Broad. Co. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 666 (Tenn. 2013) ("[W]hile the implied covenant of good faith and fair dealing 'does not create new contractual rights or obligations,

it protects the parties' reasonable expectations as well as their right to receive the benefits of their agreement.'" (citation omitted)).

- *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1046 (Utah 1989) ("The scope of the implied covenant is determined by the factual setting in which it is found. Indeed, where the reasonable expectations of the parties are met, there is no breach" of the covenant).

- *Southface Condo. Owners Ass'n v. Southface Condo. Ass'n*, 733 A.2d 55, 58 (Vt. 1999) ("The purpose of the implied covenant of good faith and fair dealing is to ensure that parties act with 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" (citation omitted)).

- *Badgett v. Sec. State Bank*, 807 P.2d 356, 360 (Wash. 1991) (en banc) ("[T]he duty arises only in connection with terms agreed to by the parties.").

- *Beidel v. Sideline Software, Inc.*, ___ N.W.2d ___, 2013 WL 4511373, at *13 n.26 (Wis. 2013) ("'Whether the duty to act in good faith has been met in this case should be determined by deciding what the contractual expectations of the parties were.'" (quoting standard Wisconsin jury instruction regarding breach of covenant)).

- *City of Gillette v. Hladky Constr., Inc.*, 196 P.3d 184, 196 (Wyo. 2008) ("It requires the parties to act in accordance with their agreed common purpose and each other's justified expectations.").

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUL 31 2013
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No. 12-462

In the

Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., AND DELTA AIR LINES, INC., a Delaware corporation,

Petitioners,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,

Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CARGO AIRLINE ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the court of appeals err by holding, in conflict with the decisions of other Circuits, that respondent's implied covenant of good faith and fair dealing claim was not preempted under the ADA because such claims are categorically unrelated to a price, route, or service, notwithstanding that respondent's claim arises out of a frequent flyer program (the precise context of *Wolens*) and manifestly enlarged the terms of the parties' voluntary undertakings, which allowed termination in Northwest's sole discretion.

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BRIEF OF *AMICUS CURIAE* THE CARGO AIRLINE ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Cargo Airline Association (CAA) is the nationwide trade organization for members of the all-cargo air carrier industry and others that depend on air cargo services. It represents the interests of six all-cargo air carrier members: ABX Air, Inc., Atlas Air, Inc., FedEx Express, United Parcel Service Co., DHL Express, and Kalitta Air, LLC. It also has a number of associate members, which include airports that generate a significant amount of air freight and other industry members with a stake in the air cargo marketplace.[2] As the voice of the all-cargo air carrier industry, the CAA represents the industry before federal and state regulatory bodies, the United States Congress and, when necessary, in the state and federal courts.

The all-cargo air carrier industry is a critical component of the nation's economy, a component that differs significantly from the passenger carrier industry. It includes both scheduled and on-demand operators that provide a worldwide network of air

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[1] Pursuant to Supreme Court Rule 37, *amicus* states that no counsel for a party authored this brief in whole or in part, and no one other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] A complete list of CAA's members is available at http://www.cargoair.org/our-members.cfm.

transportation and delivery services. Customers range from individuals and small businesses in small communities to multi-billion dollar corporations shipping packages or heavy freight throughout the world. Among the broad range of services that all-cargo carriers provide are the delivery of time-critical perishables, such as vital medical supplies; human organs and immunization materials; and mission-critical airlift services for government agencies, the military, and nongovernment organizations such as the United Nations and the World Health Organization.

Over its sixty-plus year history, a primary mission of the CAA has been to protect its members from unduly burdensome regulations. The Cargo Airline Association began in 1948 as the Air Freight Forwarders Association, which was formed to protect members of the new air freight forwarding industry from overly burdensome regulation by the Civil Aeronautics Board. Following deregulation of the air carrier industry, the CAA has sought to ensure that Congress' deregulatory objectives are preserved and upheld against re-regulation by states and localities, as provided by the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1708 (1978) (currently codified, as amended, at 49 U.S.C. § 41713(b)(1)), the statute at issue in this case.[3]

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[3] This Court has recognized that the preemption provision in the subsequently enacted Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, Title VI, § 601(b)-(c), 108 Stat. 1569, 1605-06 (1994) (currently codified at 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A)) has the same preemptive effect as the ADA. *See Rowe v. N.H. Motor*

Proper application of ADA preemption is of utmost importance to the CAA's members, who rely on the ADA to prevent all-cargo air carriers from being subjected to a complicated patchwork of state regulations. A uniform system of regulation is critically necessary for all-cargo carriers. Unlike passenger carriers, many all-cargo carriers (FedEx and UPS, for example), provide their services to every zip code in the United States and offer money-back guarantees if service commitments are not met. A patchwork system of state and local regulations necessarily disrupts carriers' ability to meet these service obligations, in addition to their ability to operate efficiently, innovate, plan and make informed decisions about their business relationships. The Ninth Circuit's decision below would allow for such a patchwork and conflicts with both Congress' deregulatory intent and decisions from this Court. Accordingly, a reversal of the Ninth Circuit's decision by this Court is crucial to CAA's members.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision below should be reversed because it found not preempted respondent's state-law claim that relates to air carriers' prices, routes, and services, in direct violation of the ADA

Transp. Ass'n, 552 U.S. 364, 370 (2008); *see also* H.R. Conf. Rep. No. 103-677, at 83 (1994) ("The central purpose of [FAAAA preemption] is to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the identical intrastate preemption of prices, routes, and services as that originally contained in" the ADA). Some of CAA's members also have motor carrier operations.

and this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). The Ninth Circuit's decision disregards this Court's conclusion in *Wolens* that an airline's administration of its frequent flyer program relates to the airline's prices and services. It also fails to heed *Wolens* by categorically holding that contract-related claims, including claims for breach of the implied covenant of good faith and fair dealing, are not preempted by the ADA, notwithstanding this Court's clear guidance that contract claims avoid preemption only to the extent they are strictly limited to the parties' own bargain. Because a claim for breach of the implied covenant of good faith is not so limited, the Ninth Circuit erred in finding such a claim to be within *Wolens*' limited exception to ADA preemption.

Moreover, claims for breach of the implied covenant implicate precisely the type of unpredictability and non-uniformity that Congress intended to curtail when it enacted the ADA's preemption provision. Because they are not based on the express terms of a contract, implied covenant claims are inherently unpredictable even under the law of a single jurisdiction, resulting in increased transaction costs and fostering litigation. Furthermore, state law regarding claims for breach of the implied covenant is not uniform among the states. Thus, a finding that such claims are not preempted threatens air carriers with a regulatory patchwork that Congress sought to avoid.

This Court's correction is required to remedy the Ninth Circuit's spurning of congressional intent and

this Court's guidance. Accordingly, the Ninth Circuit's decision should be reversed.

ARGUMENT

I. The Ninth Circuit's conclusion that an implied covenant claim regarding a frequent flyer program is unrelated to a carrier's prices, routes, or services directly conflicts with *Wolens* and imposes inappropriate burdens on air carriers.

There are two elements to ADA preemption, and the Ninth Circuit got both of them wrong here. The first element is that the state law or claim at issue must be "related to" an air carrier's price, route, or service. 49 U.S.C. § 41713(b)(1). The Ninth Circuit inexplicably concluded that this element was not met here, in direct contravention of this Court's *Wolens* decision.

In *Wolens*, this Court held that state-law claims based on an airline's conduct in administering its frequent flyer program related to both the airline's prices and services. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995) ("Plaintiffs' claims relate to 'rates,' *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates.").[4] In fact, this Court found the

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[4] The ADA originally referred to air carrier "rates, routes, or services," but Congress revised it in 1994 to refer to "a price, route, or service of an air carrier." Congress intended this change to have no substantive effect. *See Wolens*, 513 U.S. at

relationship between an airline's frequent flyer program and the airline's rates and services so obvious that it "need not dwell" on the issue. *Id.*

Here, just as in *Wolens*, the challenged conduct involves an airline's administration of its frequent flyer program. Thus, just as in *Wolens*, the relationship to the airline's prices and services is obvious. The district court recognized this link, noting that this Court has made "abundantly clear" that a frequent flyer program relates to air carriers' prices and services. Pet. App. 69. Yet the Ninth Circuit somehow reached the opposite conclusion, finding that the Respondent's claim relates to neither Northwest's prices nor services. *Id.* at 17. The Ninth Circuit recognized that *Wolens* had "a fact pattern similar to this case," yet failed even to acknowledge, much less address, this Court's conclusion that the state-law claims in *Wolens* challenging an airline's administration of a frequent flyer program related to the airline's prices and services. *Id.* at 9, 17-19. Instead, the Ninth Circuit cited pre-ADA congressional testimony from the Civil Aeronautics Board, noting that the "CAB's representatives never suggested that the 'relating to' language created a broad scope for preemption." *Id.* at 18. The Ninth Circuit's reliance on a negative implication from Civil Aeronautics Board representatives' testimony, and other legislative history, rather than on this Court's clear instruction about the scope of the term "related to" in the ADA, is baffling.

222-23 & n.1.

The Ninth Circuit's failure to respect this Court's instructions about the meaning of "related to" not only flouts this Court's precedent, but will also lead to increased litigation and impose unnecessary additional costs on air carriers. Where a relationship between challenged conduct and an air carrier's price, route or service has already been found, air carriers should not have to relitigate that issue every time a new plaintiff asserts slightly different claims. Other circuits have recognized this. For example, the First Circuit recently acknowledged it in *Brown v. United Airlines, Inc.*, __ F.3d __, 2013 WL 3388904 (1st Cir. July 9, 2013). There, the plaintiffs asserted state common law claims arising out of air carriers' imposition of baggage handling fees for curbside service. *Id.* at *1. The First Circuit noted that the issue of whether the claims "related to" the airlines' prices, routes or services was an "open-and-shut matter," because that relationship had already been established in a prior case, albeit one involving different claims. Specifically, the First Circuit had concluded in *DiFiore v. American Airlines, Inc.*, 646 F.3d 81 (1st Cir. 2011), that state statutory claims challenging an airline's imposition of baggage handling fees "related to" the airline's prices and services. While the claims in *DiFiore* and *Brown* were different, the First Circuit nevertheless concluded that its "decision in *DiFiore* . . . conclusively resolve[d]" the related-to question because the airline conduct at issue was the same. *Brown*, 2013 WL 3388904, at *3.

Under the Ninth Circuit's approach, however, carriers would have to re-establish the relationship with prices, routes or services each time a plaintiff

brought slightly different claims challenging the same basic conduct. Not only would this add expense and delay to litigation, but it would allow for inconsistent results. The same conduct (here, for example, an air carrier's administration of its frequent flyer program) could be "related to" a carrier's prices, routes, and services for purposes of some claims (consumer fraud and breach of contract, as in *Wolens*), but not for others (breach of the implied covenant of good faith and fair dealing, as under the Ninth Circuit's decision). Such an approach makes no sense and, more importantly, is inconsistent with Congress' express purpose for ADA preemption.

II. The Ninth Circuit's conclusion that the ADA does not preempt an implied covenant claim, which imposes requirements other than those a carrier itself has stipulated, directly conflicts with *Wolens*.

The Ninth Circuit's decision is also contrary to the reasoning and decision of *Wolens* on the second element of ADA preemption, which requires the enforcement of a state law. While *Wolens* established that the ADA does not preempt certain breach-of-contract claims, it made clear that this limitation is confined to enforcement of contract terms voluntarily undertaken by the airline. 513 U.S. 219, 228-29, 232-33. The Ninth Circuit's decision improperly expands that limitation to allow a claim unmoored from any term the air carrier voluntarily undertook and based, instead, on state public policy. This result contravenes *Wolens* and imposes precisely the type of

regulatory costs on air carriers that Congress intended the ADA's preemption provision to prevent.

In *Wolens*, this Court carefully delineated the types of contract claims that are protected from preemption under the ADA and those that are not. Specifically, the hallmark of un-preempted contract claims is that they seek to enforce "what the airline itself undertakes," as opposed to "what the State dictates." 513 U.S. at 233. To ensure this distinction was clear, this Court reiterated the fact that, to escape preemption, the airline itself must have embraced the obligation. Thus, this Court explained that the ADA does not preempt claims that:

- "simply give effect to the bargains *offered by the airlines* and accepted by airline customers";
- "alleg[e] no violation of *state-imposed obligations*";
- "seek[] recovery solely for the airline's alleged breach of its *own, self-imposed undertakings*";
- seek to enforce "*terms and conditions airlines offer* and passengers accept";
- do not seek to impose "binding standards of conduct that operate *irrespective of any private agreement*";
- seek a remedy "for a contractual commitment *voluntarily undertaken*";
- are "confined to a *contract's terms*";
- seek to enforce "agreements *freely made*, based on the needs perceived by the contracting parties at that time";
- afford relief for breach of "a term the *airline itself stipulated*"; and

- seek only to enforce "what the *airline itself undertakes*."

Id. at 228-33 (emphases added). Expressly recognizing that state-law contract principles will be preempted if they impose state policies rather than the parties' contract, this Court summed up the applicable standard for ADA preemption of breach-of-contract actions as follows: courts are confined to enforcement of only "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 233 & n.8.[5]

The Ninth Circuit failed to heed these plain instructions in this case, however. Rather than analyzing whether the implied covenant claim imposes state policies external to the agreement, as *Wolens* requires, the Ninth Circuit held that the ADA categorically does not preempt any contract-related claims. Pet. App. at 12 ("[T]he ADA cannot preempt breach of contract claims, including those based on common law principles such as good faith and fair dealing."). That is directly contrary to *Wolens*, which rejected a categorical approach to ADA preemption of breach-of-contract claims and instead made clear that the claim being asserted must be examined to determine whether it seeks to enforce the parties'

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[5] The ADA's preemption provision originally stated that states may not "enact or enforce any *law, rule, regulation, standard* or other provision having the force and effect of law" related to air carrier rates, routes or services. Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1707-08 (1978) (emphasis added). Congress streamlined the provision in 1994 to refer only to a "law, regulation or other provision having the force and effect of law," but it intended no substantive change. *See Wolens*, 513 U.S. at 222-23 & n.1.

bargain or something external to the contract. 513 U.S. at 233 & n.8.

When the appropriate analysis is undertaken, there is no question that the implied covenant of good faith is an extra-contractual enlargement based on state standards and policy. The first and most basic indication is the claim's title—the covenant is "implied" because it is not found in the agreement. Another indication of the claim's extra-contractual nature in this case is the fact that the district court simultaneously concluded there was no facially plausible claim for breach of contract (a conclusion that was not challenged on appeal). Pet. App. 71-72. Thus, the implied covenant plainly was not a "term the airline itself stipulated" or a "self-imposed undertaking," as *Wolens* requires. 513 U.S. at 228, 232-33.

To the contrary, the implied covenant of good faith and fair dealing is an imposition of state policy, grounded in "community standards of decency, fairness or reasonableness." Restatement (Second) of Contracts § 205. *See also, e.g., Stark v. Circle K Corp.*, 751 P.2d 162, 166 (Mont. 1988) ("The covenant is implied as a matter of law based on the public policy of this State."); *T.D. Bank, N.A. v. Nutmeg Inv., LLC*, 50 Conn. L. Rptr. 714, 2010 WL 4277552, at *6 (Conn. Super. Sept. 29, 2010) (implied covenant of good faith and fair dealing "was created as a matter of public policy to protect the public"). Notably, the Restatement (Second) of Contracts discusses the implied covenant of good faith in the same topical grouping—entitled "Considerations of Fairness and the Public Interest"—as the doctrine of

unconscionability, which the United States expressly noted in *Wolens* "might well be preempted." Br. for the United States at 28, *Wolens*, No. 93-1286 (U.S. June 2, 1994).

That the implied covenant is a state-imposed obligation rather than a term the air carrier itself has specified is further demonstrated by the fact that parties generally cannot waive it. As the United States emphasized in *Wolens*, a primary reason the ADA does not preempt "purely voluntary" contract terms "of the parties' own making" is because the airline is always free to change those terms. *Id.* at 21. "[I]f an airline's experience proves that particular terms are unprofitable or burdensome, the airline is free not to agree to such terms in the future." *Id.*

That is not true for the implied covenant of good faith and fair dealing, however, which in many states cannot be waived. *See, e.g.*, Thomas A. Diamond & Howard Foss, *Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 Hastings L.J. 585, 625 (1996) ("Of the courts that have addressed the issue, most . . . have agreed that the covenant cannot be waived."); *Stark*, 751 P.2d at 166 (implied covenant of good faith and fair dealing not subject to contractual waiver); *T.D. Bank*, 2010 WL 4277552, at *6 (party "cannot waive the duty of good faith and fair dealing as it was created as a matter of public policy to protect the public"); *Smith v. Grand Canyon Expeditions Co.*, 84 P.3d 1154, 1159 (Utah 2003) ("[T]he implied covenant of good faith and fair dealing cannot be waived . . . ."). As a leading

commentator has explained, "[o]ur unwillingness to allow people to disclaim the obligation of good faith shows that the obligation cannot be implied, but is law imposed." Arthur L. Corbin, 3A Corbin on Contracts § 654A, at 106 (Lawrence A. Cunningham & Arthur J. Jacobsen eds., Supp. 1999), *quoted in Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 436 n.4 (Ariz. Ct. App. 2002). Because the implied covenant is imposed regardless of the parties' intent, it is anything but the type of self-imposed, voluntarily undertaken term that this Court held not preempted in *Wolens*.

III. The Ninth Circuit's conclusion that the ADA does not preempt an implied covenant claim imposes non-uniformity costs on carriers that violate Congress' deregulatory purpose.

Imposition of the extra-contractual good-faith covenant conflicts with Congress' purposes for the ADA because it results in unpredictability and non-uniformity, contrary to the fundamental deregulatory objective of boiling things down to a predictable, nationwide regime unhindered by variable state regulation.

To start, the implied covenant imposes significant costs of unpredictability, even within a single jurisdiction. Because the covenant is not based on the express terms of the contract, there is no uniform approach for determining what conduct violates it. As a result, application of the implied covenant "has been ad hoc, yielding inconsistent results and depriving parties of the ability to predict

what conduct will violate" it. Diamond & Foss, 47 Hastings L.J. at 586. Courts end up resolving implied covenant cases based on intuition and without clear guidelines, which increases transaction costs and fosters litigation. *Id.* at 590-600.

Without a definitive understanding of what the covenant requires, parties are unable to accurately assess their contractual rights. This can lead to parties being saddled with unexpected contractual obligations to which they would not have agreed, which is plainly contrary to this Court's instruction in *Wolens* that contractual enforcement against air carriers must be limited to "the parties' bargain." 513 U.S. at 233. Alternatively, to avoid such unexpected obligations, parties may have to expend time and resources attempting to bargain around all the potential obligations that might be imposed through the implied covenant. Diamond & Foss, 47 Hastings L.J. at 591-92 & n.29. To the extent that is even possible, it increases transaction costs and is contrary to Congress' goal of preventing states from foisting such costs on air carriers. *See, e.g.*, H.R. Conf. Rep. No. 103-677, at 87 (the purpose of identical preemption for air and motor carriers was to avoid "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ment] of expansion of markets" caused by state regulation).

These considerations are significant to all-cargo air carriers, which rely on contracts granting them discretion over certain aspects of the shipping relationship. *See, e.g.*, Atlas Air Tariff and Information by Carrier, AtlasAir.com,

http://www.atlasair.com/aa/pdfs/AtlasAirTACT.pdf; FedEx Express Terms and Conditions, FedEx.com, http://images.fedex.com/us/services/pdf/SG_TermsCond_US_2013.pdf; United Parcel Service (UPS) Terms and Conditions of Service, UPS.com, http://www.ups.com/media/en/terms_service_us.pdf. Such provisions are important because they relieve the parties from having to attempt to exhaustively address every possible contingency that might come up, while providing a clear-cut line regarding the parties' mutual rights and obligations. If, however, these provisions can be limited or changed on an ad hoc basis by the implied covenant, then carriers and those with whom they contract will face significant uncertainty about their rights under their contracts.

These unpredictability costs are compounded by the fact that the law regarding the implied covenant of good faith and fair dealing is not uniform from state to state. Thus, carriers who operate in more than one state or nationwide, like CAA's members, will potentially be subject to a patchwork of state laws. Preventing such a patchwork was one of Congress' primary objectives for ADA preemption. *See* H.R. Conf. Rep. No. 103-677, at 87 (noting Congress' purpose for the ADA when enacting a parallel preemption provision for motor and intermodal carriers); *see also Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008) (a "state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace").

Part of this Court's rationale for finding the breach-of-contract claim not preempted in *Wolens* was its observation that there was minimal risk of inconsistency, since it merely allowed for the enforcement of express contract terms that were identical nationwide. "Because contract law is not at its core 'diverse, nonuniform, and confusing,' we see no large risk of nonuniform adjudication inherent in 'state-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide.'" 513 U.S. at 233 n.8 (internal citation omitted). The same is not true for claims asserting breach of the implied covenant of good faith and fair dealing, however. In fact, "the covenant of good faith and fair dealing can create liability in some states but not others for the exact same acts by a contracting party." Leon Silver, *Choice of Law and the Covenant of Good Faith and Fair Dealing*, For the Defense (DRI – The Voice of the Defense Bar), Feb. 2013, at 25. The variety of approaches the states have taken with respect to the implied covenant illustrates its amorphous and uncertain nature.

Arizona, for example, takes an expansive view of the implied covenant, allowing a claim for its breach separate and apart from any breach of the express contract. Thus, a party can be liable for failure to perform a condition nowhere specified in a contract. *See, e.g., Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 29-31 (Ariz. 2002) (although contract imposed on bank no obligation to volunteer information, the bank could still be liable for breach of the implied covenant if its failure to

provide the information deprived the other party of a primary benefit of the agreement); *see also id.* at 29 ("[A] party may . . . breach its duty of good faith without actually breaching an express covenant in the contract.").

In Delaware, the implied covenant applies only in a "narrow band of cases." *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. 2009). It does not apply "when the subject at issue is expressly covered by the contract," but only when "the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer." *Id.* Likewise, California does not allow the implied covenant to "be endowed with an existence independent of its contractual underpinnings. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1110 (Cal. 2000) (internal citation omitted). Illinois "essentially use[s the implied covenant] as a construction aid in determining the intent of the parties where an instrument is susceptible of two conflicting constructions." *Resolution Trust Corp. v. Holtzman*, 618 N.E.2d 418, 424 (Ill. Ct. App. 1993). Unlike many other states, however, Illinois also allows parties to waive the implied covenant. *See, e.g., Bass v. SMG, Inc.*, 765 N.E.2d 1079, 1090 (Ill. Ct. App. 2002) ("Illinois recognizes a 'covenant of good faith and fair dealing' in every contract as a matter of law, absent an express disavowal.").

New York has a broader view of the implied covenant. While it will not allow the implied covenant to impose obligations inconsistent with the express contract terms, the implied covenant does encompass "any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 773 N.E.2d 496, 500-01 (N.Y. 2002) (quoting *Rowe v. Great Atl. & Pac. Tea Co.*, 385 N.E. 2d 566 (1978)). Thus, unlike in Delaware, New York courts can look beyond the express intent of the parties as stated in the contract. Meanwhile, Texas imposes "no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions." *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 52 (Tex. 1998).

The result of these types of state-law differences if implied covenant claims are not preempted by the ADA is a patchwork effect that Congress intended to prevent. Conduct by carriers will be permissible—or not—depending on the particular state law that applies. Thus, for example, an airline whose contract gives it sole discretion regarding membership in its frequent flyer program may be able to terminate membership for any reason or no reason at all as to a customer in one state, but not as to a customer in another state, even if both customers are subject to the identical contract terms. All-cargo air carriers like the CAA's members would face the same challenge. They may be forced to treat customers or vendors in different states differently, even under a uniform, nationwide contract. Alternatively, they may be forced to enter into state-

specific contracts or, in the interest of uniformity, revise their nationwide contract to comply with the most restrictive state's requirements or attempt to work around it through a choice-of-law provision.

Congress enacted the ADA's preemption provision precisely because of concerns that such a patchwork of state rules would impose heavy burdens on air carriers and restrict their ability to make business decisions and enter contracts guided by notions of competition and innovation rather than state-imposed limitations. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (Congress determined that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality of air transportation services") (internal alterations omitted). Accordingly, the Ninth Circuit's conclusion that the ADA does not preempt claims for breach of the implied covenant is contrary to Congress' intent.

CONCLUSION

The Ninth Circuit's decision is unfaithful to both this Court's instruction and Congress' intent for ADA preemption. Accordingly, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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NORTHWEST, INC. A MINNESOTA CORPORATION AND WHOLLY-OWNED SUBSIDIARY OF DELTA AIR LINES, INC., AND DELTA AIRLINES, INC., A DELAWARE CORPORATION, PETITIONERS,

v.

RABBI S. BINYOMIN GINSBERG, AS AN INDIVIDUAL CONSUMER, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America respectfully submits this brief as amicus curiae in support of petitioners.[1]

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (Chamber) is the world's largest federation of business companies and associations. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, it regularly files briefs as amicus curiae, both in this Court and in other courts, in cases raising issues of vital concern to the business community.

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[1] Petitioners filed a letter with the Clerk of the Court providing blanket consent to the filing of amicus briefs pursuant to Rule 37.3(a). A letter from counsel for respondent consenting to the filing of this brief has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The Chamber files this brief to address the Ninth Circuit's fundamental misapplication of preemption principles. By permitting respondent to pursue a claim for breach of an implied covenant of good faith and fair dealing, the Ninth Circuit wrongly opened a backdoor around the preemption scheme established by Congress. If not corrected, that misguided decision will harm the airline industry upon which our Nation's economy depends. More broadly, the rationale of the Ninth Circuit places other preemption schemes at risk by inviting plaintiffs to re-frame claims as ones for breach of an implied covenant.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's ruling creates an end run around preemption that threatens to undermine the efficient operation of the national economy. The Ninth Circuit's ruling allows states to do through claims for breach of implied-by-law covenants what they cannot do through regulation.

The Ninth Circuit has allowed a private plaintiff to enforce state policies that would enlarge or enhance an airline's self-imposed contractual obligations. But such claims are contrary to Congress's determination in the Airline Deregulation Act (ADA) that the airline industry functions best when its prices, routes, and services are governed solely by uniform national laws. If not reversed, the decision below would subject airlines to a panoply of claims based on state judges' and juries' views of whether the airlines had acted with sufficient "good faith" and "fair dealing."

But this Court's decision will have implications beyond frequent flyer programs and beyond airlines. The Ninth Circuit's rationale threatens other preemption schemes as well. For one, this Court's ruling undoubtedly will be applied to the scope of the Federal Aviation Administration Authorization Act of 1994 (FAAAA). That statute uses nearly identical preemption language to free the cargo transportation industry from a patchwork of state laws.

With the benefit of FAAAA preemption, national and regional cargo carriers have created uniform, cost-effective, and efficient transportation networks throughout the United States. Implied covenant claims could resurrect a patchwork of state law obligations Congress intended to eliminate. In the end, businesses and consumers would be harmed as carriers would no longer enjoy the efficiencies of uniformity, would be unable to provide as many options, and would have to charge higher prices.

It takes little imagination to foresee the same end run around preemption statutes applied to other preemptive schemes. Such enforcement of myriad states' policies through implied covenant claims would be antithetical to the very notion of federal preemption. And it would harm the national economy.

ARGUMENT

A. The Ninth Circuit's Ruling Undermines Preemption Principles And Resurrects A Burdensome Patchwork Of State Regulation

The Ninth Circuit's ruling opens a backdoor to state regulation that the ADA, by its express terms, closed shut. If not reversed, that ruling would revive the very patchwork of regulation that Congress precluded.

1. Under Wolens, *airlines face only routine breach-of-contract claims*

Congress enacted the ADA preemption provision to ensure that states did not interfere with federal deregulation of the airline industry. "Congress 'determin[ed] that maximum reliance on competitive market forces' would favor lower airline fares and better airline service." *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 367 (2008) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

This Court held in *Wolens* that the ADA permits only the enforcement of an airline's "self-imposed undertakings" through "routine breach-of-contract claims." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228, 232-233 (1995). In adjudicating such claims, the ADA confines courts "to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 233. As this Court explained, "[a] remedy confined to a contract's terms simply holds parties to their agreements—in this instance, to business judgments an airline made public about its rates and services." *Id.* at 229.

In accordance with *Wolens*, airlines and their customers know that they can enforce the express terms of their contracts. Such contract enforcement is essential to the business of the Chamber's members, as "[t]he stability and efficiency of the market depend fundamentally on the enforcement of agreements

freely made, based on needs perceived by the contracting parties at the time." *Id.* at 230 (internal quotation marks omitted).

Yet the Ninth Circuit's decision in this case goes beyond the enforcement of self-imposed undertakings. It exposes airlines to liability based on extra-contractual duties and policies imposed by state law. Exempting claims for breach of an implied covenant of good faith and fair dealing from ADA preemption would subject airlines to a wide variety of claims based on state standards of good faith, reasonableness, and fairness that Congress preempted. Should this Court permit implied covenant claims to evade preemption, airlines will be subject to far more than the mere inconvenience of litigation. Rather, amorphous and expansive implied covenant claims would significantly impact carrier prices and services, and correspondingly affect businesses and consumers. If not reversed, the Ninth Circuit's decision threatens to erode the benefits that ADA preemption has provided to airlines and their customers. That result would cause corresponding harms to the economy.

2. *Plaintiffs could resurrect a variety of preempted claims under the rubric of good faith and fair dealing*

By its nature, an implied covenant of good faith and fair dealing is not an express, self-imposed undertaking; it is implied into a contract based on state policy expressed through common law. Such implied duties may differ from, or may not be found in, the

express terms of the agreement. Here, respondent invoked an implied covenant to restrict an airline's contractual right to determine "in its sole judgment" whether to terminate respondent's frequent flyer status for abusing the program. Pet. App. 4a. Respondent's claim is not that the airline breached its contract. Instead, the claim is that state policy precludes the airline from exercising its express contractual right unless the airline satisfies state policy as to good faith and fair dealing.

In *Morales*, this Court addressed similar restrictions on frequent flyer programs contained in the National Association of Attorneys General (NAAG) Air Travel Industry Enforcement Guidelines. 504 U.S. at 379, 407-417 (Appendix). The NAAG Guidelines addressed how airlines could "reserve [the] right" to change frequent flyer programs "by adequately providing" notice consistent with state law. The Guidelines included "acceptable" approaches to changing programs "without unreasonably altering the rights and expectations of vested members." And they required a "reasonable" period after notice before changes could take place. *Id.* at 408, 410, 413 (comments to Sections 3, 3.1, 3.2). As this Court noted in *Wolens*, those guidelines "highlight the potential for intrusive regulation of airline business practices inherent in state consumer protection legislation," including by "instruct[ing] airlines on language appropriate to reserve rights to alter frequent flyer programs." 513 U.S. at 227-228.

Morales and *Wolens* both make clear that such guidelines cannot be enforced through a claim under state consumer laws. However, respondent's claim for breach of an implied covenant of good faith and fair dealing would achieve the same prohibited result. Respondent asserts that the implied covenant "precludes any action . . . that would contravene [his] reasonable expectations." J.A. 51-52. And he seeks compensation for "the lost benefits, rights and privileges" of his program membership status. *Ibid.* Thus, although respondent could not use state consumer protection laws to hold petitioners liable for allegedly revoking his frequent flyer status contrary to his reasonable expectations, he invokes state policy encompassed in the implied covenant to achieve the same result. *See Moffitt v. JetBlue Airways Corp.*, No. 11-CV-1387, 2012 U.S. Dist. LEXIS 50974, at *16 (N.D.N.Y. Apr. 5, 2012) (characterizing airline passengers' implied covenant claim as "functionally indistinguishable from [their] statutory unfair and deceptive practice claim"). Allowing this claim to escape preemption would invite the repleading of all manner of preempted state-law claims as alleged breaches of good faith and fair dealing.

These concerns are real. Implied covenant suits have been filed against airlines in attempts to alter various types of contractual prices and services. For example, airline contracts may provide that certain tickets are nonrefundable. Yet passengers who purchased nonrefundable tickets have asserted implied covenant claims when the airline failed to given them

any money back on their unused tickets. The passengers claimed the airline breached the implied covenant by retaining fees and taxes the airline collected in connection with their tickets without first providing adequate notice that the airline would do so. *Buck v. American Airlines, Inc.*, 476 F.3d 29, 31-32 (1st Cir. 2007).

Implied covenant suits even have challenged the manner in which airlines calculate their fees. For example, airline contracts may require that taxes be collected from all passengers and provide a mechanism for exempt passengers to obtain a refund. *See McMullen v. Delta Air Lines, Inc.*, 361 F. App'x 757, 758 (9th Cir. 2010). Yet rather than seek a refund, *see ibid.*, plaintiffs have brought suits claiming that an airline breached the implied covenant by not correctly "determin[ing] which taxes, fees, and surcharges were actually due for each passenger" and then retaining taxes collected from exempt passengers. *McMullen v. Delta Air Lines, Inc.*, No. 08-CV-1523, 2008 U.S. Dist. LEXIS 75720, at *2-3 (N.D. Cal. Sept. 30, 2008), *aff'd*, 361 F. App'x 757 (9th Cir. 2010). In effect, such implied covenant claims have demanded that airlines determine which passengers are not required to pay a particular tax and charge those customers accordingly.

And airline passengers diverted and delayed due to heavy winter storms have clothed state law claims against deceptive business practices in the language of the implied covenant of good faith and fair dealing. *Moffitt*, 2012 U.S. Dist. LEXIS 50974, at *16-17.

These implied covenant claims are "functionally indistinguishable" from the statutory claims *Morales* and *Wolens* have forbidden. *Id.* at *16.

Claims alleging breach of the implied covenant of good faith and fair dealing thus seek to impose myriad and varied additional terms on existing contracts. Exempting such claims from preemption, as the Ninth Circuit did in the decision below, would swallow the rule that "stops States from imposing their own substantive standards with respect to rates, routes, or services." *Wolens*, 513 U.S. at 232. Congress has determined that the imposition of such state standards is inefficient and harms the national economy.

3. *Allowing implied covenant claims would result in a patchwork of state regulation*

Enforcement of claims for breach of an implied covenant of good faith and fair dealing would give rise to a patchwork of state-imposed, extra-contractual obligations. To be sure, many states reject implied covenant claims where the alleged good faith obligations are inconsistent with the contract's terms. *See, e.g.*, *Steiner v. Thexton*, 226 P.3d 359, 365 (Cal. 2010); *Shoney's LLC v. MAC East, LLC*, 27 So. 3d 1216, 1223 (Ala. 2009); *Hobin v. Coldwell Banker Residential Affiliates, Inc.*, 744 A.2d 1134, 1137-1139 (N.H. 2000); *Continental Potash, Inc. v. Freeport-McMoran, Inc.*, 858 P.2d 66, 82-83 (N.M. 1993); *Automatic Sprinkler Corp. of Am. v. Anderson*, 257 S.E.2d 283, 284 (Ga. 1979). Yet other states nonetheless impose good faith

and fair dealing obligations that limit, or even contradict, express terms in contracts. *See, e.g.*, *Smith v. Grand Canyon Expeditions Co.*, 84 P.3d 1154, 1159 (Utah 2003); *Wilson v. Amerada Hess Corp.*, 773 A.2d 1121, 1129-1130 (N.J. 2001); *Dalton v. Educational Testing Serv.*, 663 N.E.2d 289, 291-292 (N.Y. 1995).

The common law nature of implied covenant claims would exacerbate this patchwork still further. These amorphous and expansive claims can depend on the individual judge or jury examining the claim. Each judge and each jury would be permitted to decide what "good faith" and "fair dealing" require, potentially leading to a patchwork of applications and inconsistent results. As one court observed in finding an implied covenant claim preempted, allowing such a claim would interpose an obligation to act "reasonably" in exercising discretionary authority expressly reserved under a contract. *See Samica Enters., LLC v. Mail Boxes Etc. USA, Inc.*, 637 F. Supp. 2d 712, 720 (C.D. Cal. 2008), *aff'd*, 460 F. App'x 664 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 123 (2012).

Thus, the scope of what is "reasonable" may vary from jury to jury, court to court, and state to state. A national carrier would be unable to know ahead of time whether a particular exercise of its expressly reserved contractual discretion would be found "unreasonable" or "unfair."

Depending upon the particular vagaries of the state common law, implied duties can fundamentally alter the scope of the agreement. And uniform terms

and conditions will no longer mean the same thing. Instead, they will depend on where a plaintiff brings suit. That result is precisely what Congress sought to prevent in enacting the ADA. And it runs directly counter to what this Court held in *Morales* and *Wolens*. *Wolens*, 513 U.S. at 233; *Morales*, 504 U.S. at 378.

B. If Not Reversed, The Ninth Circuit's Ruling Would Threaten Other Established Preemption Regimes, Including The FAAAA

The Ninth Circuit's end run around the ADA's express preemption provision threatens to erode other preemption schemes enacted by Congress. The harms to the economy from the Ninth Circuit's errant view thus could extend across multiple industries. This is most easily seen from the application of this Court's ruling to the analogous preemption provision of the FAAAA. Dismantling the preemption schemes that govern the airline and cargo transportation industries alone would have devastating effects on the economy. But there is no principle that would cabin the Ninth Circuit's ruling solely to those key industries.

1. The cargo transportation industry illustrates the potential deleterious effects of the Ninth Circuit's rationale

If the Ninth Circuit's ruling is not reversed, the effects undoubtedly will be felt by the Nation's commercial air, motor, and intermodal (i.e., air and ground) cargo and package delivery carriers.

a. The FAAAA contains nearly identical preemptive language to the ADA

The FAAAA contains preemptive language nearly identical to that in the ADA: "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1); *see id.* § 41713(b)(4)(A) (same with respect to "air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle").

In enacting the FAAAA, Congress "copied the language of the air-carrier pre-emption provision of the Airline Deregulation Act." *Rowe*, 552 U.S. at 370. In doing so, it was "fully aware of this Court's interpretation of that language as set forth in *Morales*." *Ibid.* Accordingly, this Court has applied its ADA authorities to determine the scope of the FAAAA. *Ibid.* ("we follow *Morales* in interpreting similar language" in the FAAAA). Lower courts likewise have applied this Court's ADA authorities, including *Wolens*, to the FAAAA. *See, e.g.*, *Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 853 (8th Cir. 2009).

Through the FAAAA, Congress sought to eliminate a patchwork of state regulation that was "caus[ing] significant inefficiencies, increased costs,

reduction of competition, inhibition of innovation and technology and [was] curtail[ing] the expansion of markets." H.R. Conf. Rep. No. 103-677, at 87. This "sheer diversity" of state regulation was a "huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Ibid.* As Congress recognized, cargo carriers frequently transported packages across state lines and back just to avoid regulations that applied to intrastate packages. *Id.* at 87-88. Congress's express findings in the FAAAA explain that state laws and regulations affecting carriers "imposed an unreasonable burden on interstate commerce [and] impeded the free flow of trade, traffic, and transportation of interstate commerce" across the Nation. Pub. L. No. 103-305, § 601(a)(1)(A)-(B), 108 Stat. 1569, 1605 (1994).

b. The FAAAA has fostered nationally uniform practices and conditions that have benefitted businesses and consumers

As Congress intended, FAAAA preemption has fostered the "competitive market forces" and innovation necessary for the development of a national cargo transportation industry that can handle the Nation's massive volume of shipments. *Rowe*, 552 U.S. at 371. Last year, UPS alone delivered 4.1 billion packages—or roughly 16.3 million packages a day.[2] FedEx likewise delivered, on average, more than 7.6 million

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[2] UPS, 2012 Annual Report, Form 10-K, at 1, *available at* http://tinyurl.com/n8dyd8e.

packages each day.[3] And DHL processed 150,000 packages each day at its "super hub" near Cincinnati, Ohio, a volume that accounts for eighty percent of all DHL shipments in the Western hemisphere.[4]

Relying on Congress's mandate in the FAAAA, carriers have implemented extensive, integrated transportation and package-handling networks to process these millions of packages a day. Carriers and their customers "depend upon an orderly flow of packages." *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003); *see* John McPhee, Uncommon Carriers 164 (2006). The carriers' networks use uniform procedures and processes that do not vary simply because an airplane or a truck crosses a state line.

Indeed, they cannot do so. Any variation can cause disruptions that might send ripple effects throughout the entire transportation network. Any disruption at any point in these operations, no matter how seemingly minor it might appear to be, can adversely affect the delivery of thousands of packages in transit. A delay of just a few minutes in sorting and loading can cause UPS to miss guaranteed delivery commitments for every package loaded at a given

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[3] FedEx, Annual Report 2012, at 12, *available at* http://tinyurl.com/kxc54n8.

[4] Bob Driehaus, *DHL Inaugurates Final Piece of Cincinnati Northern Kentucky Airport (CVG) Expansion*, KyPost.com (June 14, 2013), http://tinyurl.com/n76rby5.

UPS facility. *See New Hampshire Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 70 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008).

FAAAA preemption also allows carriers to operate under uniform terms, without having to comply with myriad state restrictions regarding the content of the terms or methods of disclosure.[5] These uniform terms create certainty for businesses, consumers, and the carriers themselves as to what the contract requires. That certainty enables businesses and consumers to determine the express benefit of the bargain they are making, to know what the fees are, and—most importantly—to know by when their packages will be delivered.

Certainty also enables carriers to maximize uniformity of operations and processes to fulfill their contractual obligations without fear of liability for claims beyond their express contractual obligations. Thus, terms and conditions, like everything else these carriers do, are designed to facilitate the timely, efficient, and low-cost transportation of packages nation- and world-wide. Carriers' terms are designed

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[5] *See, e.g.*, DHL Express Terms and Conditions of Carriage ("DHL Terms & Conditions"), at 1, *available at* http://www.dhl-usa.com/content/dam/downloads/g0/express/shipping/terms_condiitions/international/terms_conditions_of_carriage_us_en.pdf; FedEx Express Terms and Conditions ("FedEx Terms & Conditions"), at 1, *available at* http://images.fedex.com/us/services/pdf/SG_TermsCond_US_2013.pdf; UPS Tariff/Term and Conditions of Service—United States ("UPS Tariff"), at 1 § 1, *available at* http://www.ups.com/media/en/terms_service_us.pdf.

to give carriers the flexibility they need to move massive volumes of goods while meeting delivery deadlines.

To achieve these results, carrier contracts frequently reserve to one party or the other sole authority and responsibility for certain aspects of the transaction. For example, FedEx's terms allow FedEx to "determine the routing of all shipments, including the mode of transportation used" and reserve to FedEx "the right to divert any shipment (including use of other carriers) in order to facilitate its delivery."[6] UPS similarly "reserves the right in its sole discretion to use any mode of transportation whatsoever to provide the service selected by the shipper. Regardless of the mode of transportation used, the effective UPS Rates for the service selected by the shipper shall apply."[7] Such reservations of discretion may be necessary to fulfill contractual obligations—i.e., to get the package delivered on time.

Indeed, discretion over the mode of transportation often is crucial to achieve timely and cost-effective delivery on the scale that national carriers operate. Conditions are constantly in flux: "Federal Express must be prepared to meet changing weather, mechanical breakdowns, and varying conditions at airports." *Federal Express Corp. v. California Pub.*

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[6] FedEx Terms & Conditions, *supra*, at 12 ("Routing and Rerouting").

[7] UPS Tariff, *supra*, at 24 § 37.

Utils. Comm'n, 936 F.2d 1075, 1077 (9th Cir. 1991). Choice of the mode of transportation may be the determining factor for on-time delivery. "The system would not achieve its goal of certain, speedy service without backup equipment and alternative modes of transportation." *Ibid.* Indeed, "the choice of one of the three modes of transportation . . . depends on air traffic, control delays, weather, aircraft availability, and the volume of packages in the entire system." *Ibid.*

The same is true at UPS, which operates its Air Service Center all night to monitor and respond to mechanical and other delays or difficulties in its world-wide network. McPhee, *supra*, at 183. Each night, the Air Service Center is populated with "dispatchers, meteorologists, crew schedulers, crew reschedulers, flight dispatchers, and global trackers. There were contingency people studying storms and choosing alternative routes." *Ibid.* If "a UPS airplane anywhere in the world cannot take off for mechanical reasons or cannot function for any reason," "a standby crew gets into a standby airplane and flies off to fill the gap." *Ibid.*

Thus, this discretion is critical for carriers to meet, and for businesses and consumers to receive, certain on-time delivery guarantees. For example, in its Tariff/Terms and Conditions of Service for the United States, UPS "guarantees on-schedule delivery" of nearly all packages, subject to certain exclusions

denominated in the Tariff.[8] UPS will credit or refund shipping charges for packages for which it does not meet its service guarantee. FedEx makes a similar commitment.[9] In other words, "[w]hen you handle millions of packages, a minute's delay can cost a fortune[.]" Claudia H. Deutsch, *Still Brown, But Going High Tech*, N.Y. Times, July 12, 2007, at C1 (internal quotation marks omitted). Thus, if carriers are not permitted to exercise the discretion they are afforded in their contract to get a package delivered on time, carriers will not be able to offer (and businesses and consumers will not be able to receive) low-cost on time guarantees.[10]

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[8] *See* UPS Tariff, *supra*, at 31-33 § 48.

[9] *See Federal Express Corp.*, 936 F.2d at 1077 ("Federal Express guarantees delivery by 10:30 a.m. the day after a package has been picked up. There is a full refund if a package is even one minute late. To keep this schedule, even the most minor delays must be avoided[.]"); FedEx Terms & Conditions, *supra*, at 9 ("Money-Back Guarantee Policy").

[10] Carriers have various other forms of contractual discretion. For example, carriers reserve the right in their sole discretion to open and inspect packages, which may be necessary to protect the safety of their employees and the public. *See* DHL Terms & Conditions, *supra*, at 2 § 4; FedEx Terms & Conditions, *supra*, at 7; UPS Tariff, *supra*, at 13 § 6. FedEx's and UPS's terms allow the carriers discretion to assess fuel and other surcharges. FedEx Terms & Conditions, *supra*, at 7; UPS Tariff, *supra*, at 26 § 38. These carriers' terms also provide for efficiency in having businesses effectively "self-bill" for shipments by processing packages themselves. As a safeguard, the carriers reserve the right to adjust bills if they determine in their discretion that the reported shipment information was incorrect.

(Continued on following page)

The carriers' uniformity of operations, processes, and terms provides multiple benefits to carriers and their customers, both businesses and individual consumers. Having uniform procedures that emphasize efficiency keeps carriers' overall costs down, and therefore affects the prices that carriers charge. Carriers and their customers also benefit from the certainty and uniformity of knowing the terms that apply to shipments regardless of the origin, destination, and routing for any package. For large businesses that ship from locations in multiple states, that uniformity allows for certainty not only in cost but also in terms that will apply to all shipments.

As a result of FAAAA preemption, carriers can place their hubs, route their packages, and design their services based on the needs of their and their customers' businesses, *not* state regulation. These are precisely the benefits Congress contemplated when it eliminated state regulation. Before the enactment of the FAAAA, integrated transportation services "were seriously hampered by regulatory constraints." Glenn Morgan, Peer Hull Kristensen & Richard Whitley, The Multinational Firm: Organizing Across Institutional and National Divides 289 (2001). Nationwide and regional carriers had to implement different processes to comply with different laws and standards when they moved from one state or locality to another. Today, that is no longer the case. Carriers

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DHL Terms & Conditions, *supra*, at 2 § 5; FedEx Terms & Conditions, *supra*, at 3; UPS Tariff, *supra*, at 23 § 37.

compete with one another on the bases of price and service, as determined by their customer contracts. Any state law that would impose additional duties, terms, or conditions on those contracts—including limitations on the critical reservations of complete discretion afforded to the carriers—would undermine the uniformity upon which carriers and their customers depend.

c. Implied covenant claims would undermine these nationally uniform procedures and terms

All of this would be lost if, contrary to Congress's expressed intent, state policies were once again applied to cargo carriers' prices, routes, and services. Yet that would be the result if this Court were to adopt the Ninth Circuit's rationale.

These concerns are not fanciful. Such claims have been made to try to alter a carrier's contractual obligations. For example, plaintiffs have alleged that good faith and fair dealing restricts a carrier's discretion over the mode of transporting packages, insisting that they are entitled to pay less when a UPS Next Day Air® package is delivered by the guaranteed deadline without flying on an airplane. *See* Kathy Woods, *UPS Targeted in Class Action Suit*, Legal Newsline (Feb. 8, 2010), http://legalnewsline.com/news/225452-ups-targeted-in-class-action-suit; Matthew Heller, *UPS Customers Press 9th Circ. To Revive Overcharge Case*, Law360 (Apr. 9, 2013), http://tinyurl.com/km35egx.

Plaintiffs also have claimed that the implied covenant entitled them to refunds of charges notwithstanding their failure to comply with express contractual requirements governing refunds. Carriers may generate an invoice once a customer processes a shipment through a carrier's online shipping system. If the customer subsequently decides not to ship that package, the carrier contracts require the customer to request a refund. Nonetheless, customers who never requested refunds have brought class actions claiming that carriers breached an implied covenant of good faith and fair dealing for not automatically refunding their charges. *Haley Hill Designs, LLC v. UPS, Inc.*, No. 09-CV-4212, 2009 U.S. Dist. LEXIS 109512 (C.D. Cal. Nov. 23, 2009); *Cerdant, Inc. v. DHL Express (USA), Inc.*, No. 08-CV-186, 2009 U.S. Dist. LEXIS 27070 (S.D. Ohio Mar. 30, 2009).

Other implied covenant claims could obviate express limitations in a carrier's contract. For example, cargo carriers often prohibit by contract shipments that exceed a specified value. But that does not stop plaintiffs from bringing implied covenant claims to hold a carrier liable for loss of an item that exceeded that limit. *Feldman v. UPS*, No. 06-CV-2490, 2008 U.S. Dist. LEXIS 30637, at *5, *8 (S.D.N.Y. Mar. 17, 2008) (suing carrier for losing $57,000 of jewelry when contract prohibited shipping articles worth more than $50,000).

Allowing good faith and fair dealing claims to evade preemption would eliminate the certainty that carriers and businesses have achieved through

preemption. Carriers and their customers would not know whether the express terms of their contracts would be honored or instead would be modified to conform to state law policies and norms. Rather than certainty and consistency, carriers and their customers may face different requirements based on the states in which shipments were picked up or delivered, or the views of a particular judge or jury.

2. Comparable harms could arise in other contexts

The Ninth Circuit's conclusion—that all claims sounding in state contract law necessarily survive ADA preemption—is untethered to any specific text in the ADA's express preemption provision. Given that lack of a textual grounding, the Ninth Circuit's reasoning could support efforts by others who might seek to evade preemption provisions outside the ADA and the similarly worded FAAAA. The reasoning of the decision below thus could permit plaintiffs to bring claims under a variety of open-ended implied covenants, or through other common law means that do not resemble traditional state regulation.

But such maneuverings would contradict this Court's repeated and clear pronouncements that broad federal preemption provisions (such as those in the ADA and FAAAA) apply with equal force to state legislative enactments, state regulations, and state common law. After all, common law duties are merely state regulation by a different name. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-325 (2008)

(holding that the Medical Device Amendments of 1976, which preempts "any requirement[s]" of a state that are "different from, or in addition to, any requirement applicable under" the federal statute, preempted a state's "common-law duties"); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 435 (2005) (holding that a provision in the Federal Insecticide, Fungicide, and Rodenticide Act that prohibited states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required" under the statute preempted common-law actions).

Indeed, the Ninth Circuit's notion that federal law preempts *acknowledged* regulations but *not* regulations disguised as "common law" obligations, such as implied covenants, makes little sense. Congress generally passes preemption provisions to eliminate multi-state, patchwork barriers to an industry's ability to flourish in a national economy. The potential interference with such interstate economic activity from acknowledged state regulation—i.e., state legislation or regulation—would pale next to the interference certain to arise from applying the views of literally thousands of state court trial judges, and volumes more jurors, in actions governed by state common law. Manufacturers of certain medical devices, pesticides, and other products would have faced just such a patchwork of state common-law liability but for this Court's holdings such as in *Riegel* and *Bates*. If not reversed, the Ninth Circuit's judgment will lay the groundwork for future evasions of broad

federal preemption provisions in other contexts. That result would contravene both Congress's desire to provide the certainty and predictability necessary for a robust national economy, and this Court's prior precedents properly subjecting state common-law regulations to broad federal preemption provisions that give effect to Congress's judgments.

CONCLUSION

For the foregoing reasons and those stated in petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Petitioners,

v.

RABBI S. BINYOMIN GINSBERG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF *AMICUS CURIAE*

The International Air Transport Association ("IATA") is a nongovernmental international trade association founded in 1945 by air carriers engaged in international air services.[1] Today, IATA consists of 240 member airlines from 118 countries representing 84 percent of the world's total air traffic.[2] IATA strives to represent, lead and serve the airline industry by advocating the interests of airlines across the globe, developing global commercial standards for the airline industry and assisting airlines in operating safely, securely, efficiently and economically. Since 1945, IATA has worked closely with governments and intergovernmental organizations to achieve and maintain uniformity in the development, implementation and interpretation of numerous public and private international air law treaties and agreements.

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Petitioners filed a blanket consent to the filing of amicus curiae briefs with this Court. Respondent provided written consent to IATA's amicus curiae brief in support of Petitioners. A letter from Respondent's counsel evidencing such consent will be filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for a party authored this brief in whole or in part, and no one other than Amicus Curiae, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The U.S. members of IATA are: Alaska Airlines, American Airlines, Atlas Air, Delta Air Lines, Federal Express, Hawaiian Airlines, JetBlue, United Airlines, UPS Airlines and US Airways. A list of IATA's full membership may be found at http://www.iata.org/about/members/Pages/airline-list.aspx?All=true (last visited July 15, 2013).

IATA has long been a champion of harmonized international rules that facilitate the development of an efficient international air transportation system. In keeping with its long-standing commitment to seeking global consistency in aviation regulation generally, IATA advocates the adoption of harmonized and reasonable approaches to the recognition of passenger rights. At its Annual General Meeting in June 2013, IATA's member airlines unanimously adopted a resolution recommending a set of core principles for national governments to follow when adopting consumer protection legislation and regulations. App. 1a-5a. IATA's core principles recognize the burden and confusion to passengers and airlines when multiple, inconsistent consumer protection regulations are in play, simply because the passenger and plane cross international borders. IATA believes that the core principles set forth in its recent resolution will help national governments harmonize their various consumer protection regimes.

The Ninth Circuit's decision threatens to disrupt and compromise the integrity of the Federal Government's oversight and regulation of international aviation by subjecting airlines to requirements imposed by the laws of fifty different states. If allowed to stand, the decision will prevent the United States from speaking with one coherent voice in its engagement with other governments on the need everywhere for harmonized, consistent regulation of international air commerce. Thus, if not reversed, the Ninth Circuit's decision will frustrate the realization of the objectives of IATA's member airlines, as reflected in the recent IATA resolution. IATA and its members have a direct and substantial interest in the issues raised by Petitioners. IATA is uniquely positioned to provide the Court an international per-

spective on this controversy and its implications for the global airline industry.

SUMMARY OF ARGUMENT

IATA agrees with the arguments of Petitioners and its fellow amici in support of reversal of the Ninth Circuit's decision. IATA files this brief to address the far-reaching *international* implications of the question presented. If not reversed, the Ninth Circuit's decision will establish a dangerous precedent for the international air transportation system and the United States' ability to participate meaningfully in the continuing evolution of that system.

The Ninth Circuit's decision ignores the fact that the preemption provision of the Airline Deregulation Act of 1978 ("ADA" or "Act"), Pub. L. No. 95-504, 92 Stat. 1705 (1978), applies to foreign air transportation and the complex array of international obligations that bind the United States to the deregulation of international air services.

A more considered analysis would have recognized that the purpose and effect of the preemption clause was not merely to prevent states from undoing the deregulation of *domestic* air transportation; it also prevents the states from attempting to regulate, and thereby undo the deregulation of, *foreign* air transportation as well. Since the enactment of the ADA and the International Air Transportation Competition Act of 1979 ("IATCA"), the policies and benefits of deregulation have been incorporated in "Open Skies" agreements with more than 100 trading partners of the United States. Those obligations specifically include the right of airlines to engage voluntarily in joint marketing arrangements such as airline alliances that include reciprocal participation

in loyalty programs like WorldPerks. The U.S. Department of Transportation ("DOT") has exclusive regulatory authority to oversee and regulate the fairness to passengers of the terms of such programs.

By imposing state law covenants of good faith and fair dealing on the voluntary undertakings of airlines, the Ninth Circuit's decision would allow states to substitute their judgment for that of DOT. The decision, if not reversed, would result in the imposition on airlines of a patchwork of inconsistent requirements.

Most importantly, the Ninth Circuit's decision unconstitutionally allows the states to regulate the foreign commerce of the United States and compromises the ability of the United States to speak with one voice through the Federal Government in its conduct of international negotiations over the further harmonization of the rules governing international aviation markets. It would sanction the application of state common law doctrines to airline activities authorized under international obligations with nations that do not recognize the common law.

The international airlines are concerned that the Ninth Circuit's decision would create a new barrier to harmonized, internationally consistent consumer protection regulations. Because international air transportation services cross multiple borders, inconsistent consumer protection regulations create burdens for both passengers and carriers. Allowing states to impose a multiplicity of inconsistent requirements on those services would be a step backwards. Thus, the Ninth Circuit's decision, if not reversed, would frustrate the efficient development of the international air transportation system.

I. THE NINTH CIRCUIT'S DECISION IMPERMISSIBLY NARROWS THE SCOPE OF FEDERAL PREEMPTION CODIFIED IN THE ADA.

This case concerns the scope of preemption under the ADA. IATA agrees with Petitioners that the Ninth Circuit's construction of preemption under the ADA is impermissibly narrow and inconsistent with Congress's intent and this Court's prior precedent. The Ninth Circuit's decision also ignores the necessary application of ADA preemption to foreign air transportation. In doing so, the Ninth Circuit opens the door to the involvement of states in the regulation of foreign commerce, thereby compromising the ability of the United States to speak with one voice in the forging of a harmonized global framework for international air services.

A. Preemption Under the ADA Must Be Interpreted Broadly and Consistent With Its Application to Foreign Air Transportation.

Congress enacted the ADA to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." 92 Stat. at 1705. To encourage and support the newly deregulated and competitive marketplace, Congress expressly prohibited states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b).

As used in the ADA preemption provision, "air transportation" includes foreign air transportation.

See 49 U.S.C. § 40102(a)(5) (defining "air transportation" as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft"); 49 U.S.C. § 40102(a)(23) (defining "foreign air transportation" as "the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft"). The United States' involvement and participation in foreign air transportation occurs primarily through its agreements with other nations. Thus, air transportation, which includes foreign air transportation, implicates the Federal Government's relationships with, and obligations to, foreign nations, and the ADA preemption provision must be read with its application to foreign air transportation in mind. The Ninth Circuit's failure to consider the effect of ADA preemption on foreign air transportation[3] is yet another reason why its decision must be set aside as inconsistent with

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[3] The Ninth Circuit's analysis relies, in part, on the unexplained assumption that air transportation is a "field which the States have traditionally occupied." Pet. App. 6. The states never have "traditionally occupied" the field of air transportation as a general matter. Where foreign air transportation is involved, bringing with it considerations of international relations and foreign commerce, the Ninth's Circuit's assumption is even more incorrect. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) ("[f]oreign commerce is preeminently a matter of national concern"); *Brolan v. United States*, 236 U.S. 216 (1915) (the states have no standing in foreign relations); *see U.S. v. Locke*, 529 U.S. 89, 108 (2000) (there is no assumption of nonpreemption "when the State regulates in an area where there has been a history of significant federal presence").

this Court's broad interpretation of preemption under the ADA.[4]

B. The Deregulation of Foreign Air Transportation Is Enshrined in the International Obligations of the United States.

The 1978 Act marked a historic shift in government policy for air transportation both domestically and internationally. Congress declared "as being in the public interest and consistent with public convenience and necessity" that the provisions of the ADA should be carried out so as to place "maximum reliance on competitive market forces" to provide needed air transportation and determine the "variety and quality of, and . . . prices for, air transportation services." 49 U.S.C. § 40101(a). In 1980, Congress directed the Secretaries of State and Transportation to develop an international air transportation negotiating policy that would eliminate operational and marketing restrictions on airlines to the greatest extent possible. 49 U.S.C. § 40101(e); International Air Transportation Competition Act of 1979, § 17, Pub. L. No. 96-192, 94 Stat. 35, 42 (1980).

Since the 1980s, the U.S. government has sought to bring the benefits of deregulation to international air transportation markets. This initiative took the form of liberalizing the existing network of highly mercantilistic international agreements that, in the aggregate, formed an excessively restrictive global regime governing international air transportation and ran directly against core principles of U.S.

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[4] See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992), for the proposition that the ADA preemption provision should be construed broadly.

aviation policy.[5] Beginning in 1992, the United States pioneered a new generation of "Open Skies" agreements that took the liberalization initiative to an entirely new level. Defining "Open Skies," 57 Fed. Reg. 19,323 (May 5, 1992) (order requesting comments); In re Defining "Open Skies," 1992 WL 204010 (D.O.T. Aug. 5, 1992) (final order). Today, the United States has Open Skies agreements with more than 100 of its trading partners, including the European Union. *See* U.S. Dep't of State, *Open Skies Agreements*, http://www.state.gov/e/eb/tra/ata/ (last visited July 18, 2013).

Open Skies agreements strive to "expand international passenger and cargo flights by eliminating government interference in commercial airline decisions about routes, capacity and pricing." U.S. Dep't of State, *Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation* (Mar. 29, 2011), http://www.state.gov/r/pa/pl/159347.htm. The United States' model Open Skies agreement champions the promotion of "an international aviation system based upon competition among airlines in the marketplace with minimum government interference

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[5] The conventional approach dating back to the end of the Second World War was to dole out market access through carefully calibrated, highly reciprocal arrangements, limiting both the destinations to be served and the number of carriers that could serve them, and authorizing government regulation of both price and capacity. Beginning in the late 1970s, however, the United States negotiated for the reduction, and ultimately elimination, of most of the economic regulation that compromised service quality and impeded industry growth. This approach was reflected in DOT's 1995 statement on international air transportation policy. Statement of United States International Air Transportation Policy, 60 Fed. Reg. 21,841 (May 3, 1995).

and regulation" as a primary goal. U.S. Dep't of State, *Current Model Open Skies Agreement Text* (Jan. 12, 2012), http://www.state.gov/documents/organization/114970.pdf.

With respect to pricing, the model agreement provides that the United States and the other contracting country or countries "shall allow prices for air transportation to be established by airlines . . . based upon commercial considerations in the marketplace." *Id.* It defines "price" as "any fare, rate or charge for the carriage of passengers . . . *and the conditions governing the availability of such fare, rate or charge.*"[6] *Id.* (emphasis added). It identifies DOT as the "aeronautical authority" generally responsible for the administration of the model agreement on behalf of the United States. *Id.*

In sum, deregulation now is enshrined in both domestic and *international* law and policy.

C. The International Obligations of the United States Generally Authorize Joint Marketing Arrangements, Such as Airline Alliances and Their Loyalty Programs.

The ability of domestic and foreign air carriers to enter into cooperative marketing arrangements is a

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[6] These "conditions" include, of course, the earning and redeeming of frequent flyer miles. Thus, the Ninth Circuit's effort to distinguish frequent flyer programs from airline prices is inconsistent with the way "price" is defined in the Open Skies agreements of the United States.

defining feature of U.S. Open Skies agreements,[7] and one that is implemented increasingly through broad alliance agreements between air carriers.[8] The United States' conclusion of the U.S.-Netherlands Open Skies Agreement in 1992 opened the door for Northwest and KLM, a Dutch airline, to seek and obtain antitrust immunity from DOT to broaden the scope of the carriers' alliance. Joint Application of Northwest Airlines, Inc. and KLM Royal Dutch Airlines, No. OST-95-579-34, 1993 WL 13035350 (D.O.T. Jan. 11, 1993); *see* Ard-Pieter de Man, et al., *Managing Alliance Dynamics: The Case of KLM and Northwest Airlines*, at 8 (May 2008), http://www.strategic-alliances.org/storage/pdf/KLM-NWA.pdf.

The Northwest/KLM alliance became the template for arguably one of the most important developments in aviation history: the globalization of international air transportation.[9] Airline alliances allow interna-

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[7] Article 8, paragraph 7 of the model agreement provides:

> In operating or holding out the authorized services under this Agreement, any airline of one Party may enter into cooperative marketing arrangements . . . with
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> a. an airline or airlines of either Party;
>
> b. an airline or airlines of a third country; [and
>
> c. a surface transportation provider of any country.]

Model Open Skies Agreement Text, *supra*.

[8] Of course, cooperative marketing arrangements between actual and potential competitors may require approval and antitrust immunity granted by DOT. *See* 49 U.S.C. §§ 41308 and 41309.

[9] Warren L. Dean, Jr. & Jeffrey N. Shane, *Alliances, Immunity, and the Future of Aviation*, 22 Air & Space Law., no. 4, 2010 at 1, 17, available at http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/voelcker_sven_AirSpace_22.pdf.

tional carriers to offer passengers the benefits of a global network by providing for integrated air transportation services on participating carriers to destinations worldwide.[10]

Today, three major airline alliances exist: the Star Alliance (including United Airlines and US Airways), SkyTeam (including Delta/Northwest) and Oneworld (including American).[11] In 2009, these three alliances transported 84 percent of U.S. transatlantic passengers and 72 percent of U.S. transpacific passengers.[12] Through these alliances, the joint venture partners integrate not only their service networks, but also their marketing activities – and most importantly, their frequent flyer programs.[13]

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[10] Prior to the development of alliances, passengers had been required to purchase individual itineraries from different carriers connecting through interline arrangements.

[11] These alliances have been reviewed and approved by DOT. U.S. Dep't of Transp., *Airline Alliances Operating with Antitrust Immunity* (Jan. 17, 2013), http://www.dot.gov/sites/dot.dev/files/docs/All%20Immunized%20Alliances.pdf. The immunized alliances operate subject to the continuing oversight of DOT. 14 C.F.R. § 303.06.

[12] Jan K. Brueckner, et al., *Alliances, Codesharing, Antitrust Immunity and International Airfares: Do Previous Patterns Exist?*, 1 n.1 (July 2010), http://www.darinlee.net/pdfs/bls2.pdf; *see* William Gillespie & Oliver M. Richard, *Antitrust Immunity and International Airline Alliances*, 5 (U.S. Dep't of Justice Feb. 2011), http://www.justice.gov/atr/public/eag/267513.pdf.

[13] Frequent flyer programs are an essential marketing tool in a deregulated, competitive environment. Sanjai Velayudhan, *Airline Alliances & Frequent Flyer Programs*, http://www.itcinfotech.com/Uploads/GUI/knowledgecentre/Airline_alliances_and_Frequent_Flyer_Programs.pdf (last visited July 26, 2013); *see* Rex S. Toh, *Toward an International Open Skies Regime: Advances, Impediments, and Impacts*, 3 J. of Air Transp. World Wide 61, 66 (1998).

D. Northwest's WorldPerks Program, Like the Loyalty Programs of Other International Carriers, Is by Its Very Terms International and Directly Relates to the Prices Program Participants Pay for Foreign Air Transportation.

Prior to seeking antitrust immunity in 1992, Northwest and KLM already had entered into several international joint venture arrangements aimed at coordinating their airline services, including their frequent flyer programs. Joint Application of Northwest Airlines, Inc. and KLM Royal Dutch Airlines, OST-1995-579-1, at 2-3 (Sept. 9, 1992). As with other alliances, the air carriers' frequent flyer programs were integrated into the joint venture itself. The antitrust immunity sought and obtained by Northwest and KLM following the U.S.-Netherlands Open Skies Agreement enabled closer cooperation between the carriers and created new benefits for the passengers of both airlines, including Respondent.

As a member of the WorldPerks[14] program from 1999 to 2008 and also a frequent domestic and international traveler, J.A. 34, Respondent was aware of and benefited from the program's international features. Most notably, the rules of the program allowed Respondent to accumulate and redeem miles on the international service of Northwest's alliance partners,[15] J.A. 67-68, 70, which Respondent

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[14] The very name of Northwest's frequent flyer program, WorldPerks, signaled the program's international nature.

[15] Today, Delta/Northwest is a member of the SkyTeam alliance, which includes nineteen international airlines.

did. By using miles earned as a WorldPerks program participant, Respondent was able to travel internationally on flights operated by Northwest and its international alliance partners for a fraction of the price of a regular ticket. Thus, Respondent directly benefited from the liberalized international air transportation system that resulted from the Open Skies agreements negotiated by the United States. The preemption clause of the ADA clearly precludes the application of state law to the price-driven loyalty programs contemplated in these diplomatic instruments.

II. THE NINTH CIRCUIT'S DECISION IMPERMISSIBLY WOULD USURP DOT'S EXCLUSIVE AUTHORITY TO ADDRESS UNFAIR AND DECEPTIVE PRACTICES IN AIR TRANSPORTATION.

A. Congress Vested DOT with Consumer Protection Authority Over Interstate and Foreign Air Transportation.

Congress assigned responsibility for consumer protection and enforcement for both interstate and foreign air transportation exclusively to DOT. Specifically, DOT has the authority to prohibit and punish unfair and deceptive practices in air transportation and in the sale of air transportation. 49 U.S.C. § 41712(a). Under this authority, DOT may prohibit, by regulation or on a case-by-case basis, conduct or practices of a carrier that it determines is

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SkyTeam Members, http://www.skyteam.com/en/About-us/Our-members/ (last visited July 28, 2013).

unfair. *See Am. Airlines, Inc. v. N. Am. Airlines, Inc.*, 351 U.S. 79, 80 (1956).[16]

DOT's regulatory authority to prohibit airline practices that it deems unfair or deceptive extends to a carrier's frequent flyer program and the agreements underlying such frequent flyer program.[17] It regulates these programs in many formal and informal ways. DOT has exercised its authority over frequent flyer programs through written guidance and enforcement proceedings. In 2003 and again in 2012, DOT issued guidance on the advertisement of "free" fares. U.S. Dep't of Transp., *Guidance on the Use of the Term "Free" in Air Fare Advertisements and Disclosure of Consumer Costs in Award Travel* (May 17, 2012), http://airconsumer.dot.gov/rules/Use

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[16] In 2011, DOT exercised this regulatory authority by issuing a regulation prohibiting air carriers from:

> impos[ing] any contract of carriage provision containing a choice-of-forum clause that attempts to preclude a passenger, or a person who purchases a ticket for air transportation on behalf of a passenger, from bringing a claim against a carrier in any court of competent jurisdiction, including a court within the jurisdiction of that passenger's residence in the United States (provided that the carrier does business within that jurisdiction).

14 C.F.R. § 253.10. This provision directly proscribes, in air transportation, a forum-selection clause of the kind upheld by this Court in the case of ocean cruise lines. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (upholding forum-selection clause in a passenger cruise ticket).

[17] *See* FAA Modernization and Reform Act of 2012, § 408, Pub. L. No. 112-95, 126 Stat. 11 (2012) (providing that the Secretary of Transportation "may investigate consumer complaints regarding . . . the rights of passengers who hold frequent flyer miles or equivalent redeemable awards earned through customer-loyalty programs").

%20of%20the%20word%20free%20in%20fare%20advertisements.pdf; U.S. Dep't of Transp., *Disclosure of Additional Fees, Charges and Restrictions on Air Fares in Advertisements, Including "Free" Airfares* (Sept. 4, 2003), http://www.dot.gov/sites/dot.dev/files/docs/20030904.pdf.[18] DOT's 2012 guidance specifically addressed frequent flyer award travel.

DOT has conducted formal and informal enforcement proceedings on frequent flyer programs. On multiple occasions, DOT has sanctioned airlines for failing to comply with DOT's fare disclosure regulations with respect to frequent flyer award travel. *See, e.g., British Airways PLC*, OST-2012-0002, 2012 WL 7151875 (Oct. 1, 2012) (consent order) (finding airline in violation of DOT consumer protection regulations regarding fare advertisements where airline did not disclose airline surcharges imposed in connection with air fares based on mileage awards); *Société Air France*, OST-2012-0002 (Nov. 1, 2012) (consent order), http://www.dot.gov/sites/dot.dev/files/docs/eo_2012-11-1.pdf (enforcement proceeding concerning carrier's failure to properly disclose applicable taxes and fees charged to consumers booking frequent flyer award tickets). In 1994, DOT issued guidance to the airline industry on the adequate disclosure of seat availability for frequent flyer award travel. *See* Letter from Sec. of Transp. Federico Peña to Major and Nat'l U.S. Air Carriers and to Air Travel Industry Associations and Labor Unions (Dec. 20, 1994), http://airconsumer.ost.dot.gov/rules/19941220.htm.

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[18] DOT construed its 2003 guidance to apply to frequent flyer mileage award travel. *British Airways PLC*, 2012 WL 7151875.

DOT's authority to approve and immunize international alliance agreements from the U.S. antitrust laws, 49 U.S.C. §§ 41308 and 41309, and continuing oversight of approved alliance agreements, 14 C.F.R. § 303.06, also provide ample opportunity for DOT's review of consumer protection concerns.

Finally, DOT works with the U.S. Department of Justice to analyze proposed airline mergers and acquisitions from the perspective of protecting the interests of consumers. DOT's review may include an analysis of the merger's effect on frequent flyer programs. Statement of Nancy E. McFadden (General Counsel, U.S. Dep't of Transp.) Before H. Comm. on Transp. & Infrastructure (June 13, 2000), http://testimony.ost.dot.gov/test/pasttest/00test/McFadden1.htm. Where the airlines' frequent flyer reciprocity agreements are, in DOT's judgment, unfair to consumers, DOT asks the airlines to modify those agreements. *Id.*

B. The Ninth Circuit's Decision Would Usurp the Regulatory Authority of DOT Over Interstate and Foreign Air Transportation.

The Ninth Circuit's decision would usurp DOT's authority to determine what is, and is not, fair to airline consumers by conferring on state courts the ability to impose a variety of state-defined covenants of good faith and fair dealing upon airline frequent flyer program agreements, like Northwest's WorldPerks program agreement.[19] The General

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[19] In this case, Respondent was not without a potential remedy at DOT. While DOT is not equipped to adjudicate breach of contract claims, *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 230 (1995), it is equipped and authorized to address

Terms and Conditions of the WorldPerks program, to which Respondent agreed when he became a WorldPerks member, allowed Northwest to cancel Respondent's participation in the program for "improper conduct as determined by Northwest in its sole judgment." J.A. 64-65. By allowing Respondent to proceed on an implied covenant of good faith and fair dealing claim, the Ninth Circuit placed the determination of the propriety of Northwest's exercise of its "sole judgment" in the hands of a judge and jury. For an international airline partner not familiar with the application of common law doctrines, the result suggested by the Ninth Circuit's decision is that a contract provision vesting full discretion in the airline is unenforceable.

Congress vested the responsibility for these types of determinations in DOT, and in DOT such determinations must be made. Otherwise, the international air transportation system, which relies heavily on joint market arrangements such as airline alliances and their frequent flyer programs to compete in the global marketplace for air services, will be hobbled by a patchwork of inconsistent requirements.

Perhaps more importantly, if affirmed, the Ninth Circuit's decision will establish a precedent that extends far beyond the terms and conditions of an airline's frequent flyer program. It promises to unravel the deregulated framework of international air transportation by displacing DOT as the single

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allegations of unfairness in airline practices and to prohibit any contract of carriage provision reflecting those practices, 49 U.S.C. § 41712(a).

authority empowered to maintain oversight of those services.[20]

III. THE NINTH CIRCUIT'S DECISION UNCONSTITUTIONALLY INTRUDES UPON THE FEDERAL GOVERNMENT'S AUTHORITY OVER FOREIGN AIR TRANSPORTATION AND IMPAIRS THE ABILITY OF THE UNITED STATES TO SPEAK WITH "ONE VOICE" IN MATTERS OF FOREIGN AIR TRANSPORTATION.

A. The Ninth Circuit's Decision Does Not Respect the Supremacy of the Federal Government's Authority Over Foreign Air Transportation.

It is well understood that Congress has the power to preempt state law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Congress expressly exercised its preemption power in the ADA. 49 U.S.C. § 41713(b). Congress chose to exercise its preemption power for both interstate and foreign air transportation. Congress also instructed the Executive Branch to extend the benefits of deregulation to foreign air

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[20] The Ninth Circuit's decision opens the door for the imposition of extra-contractual obligations on an air carrier, not just in the context of an airline's frequent flyer program, but also in the context of any other airline terms and conditions of carriage that a state court concludes do not have a "significant impact" on federal deregulation. *See* Pet. App. 32-33. Thus, state courts would be free to impose obligations under state law beyond what air carriers include in their contracts of carriage. This result is manifestly inconsistent with the Federal Government's policy of deregulating international air services and would involve the states in imposing patchwork obligations on the foreign commerce of the United States.

transportation. 49 U.S.C. § 40101(e); International Air Transportation Competition Act of 1979, § 17. Therefore, the preemption language of the ADA must be understood consistent with the well-settled recognition that state law must yield to federal law where, "'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby*, 530 U.S. at 372-73 (internal citations omitted).

> What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects:
>
> > "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."

Id. at 373 (internal citations omitted).

Through the ADA, Congress intended that the United States "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." 92 Stat. at 1705. Congress determined that express preemption of state law was

necessary to encourage and support this new competitive marketplace, so that states could not "undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378; *see Wolens*, 513 U.S. at 228 ("Congress could hardly have intended to allow the States to hobble [competition for airline passengers] through the application of restrictive state laws."). Given the international scope of air transportation, Congress's objectives must be viewed with an eye toward their international implications.

The Ninth Circuit's decision unconstitutionally intrudes upon the supremacy of the Federal Government's authority over foreign air transportation. The decision opens the door for state common law claims, like the implied covenant of good faith and fair dealing, to conflict with Federal Government policy and regulation. Under the guise established by the Ninth Circuit, the several states, by applying their own particular versions of the implied covenant of good faith and fair dealing, will "regulate" an airline's application and enforcement of its international customer loyalty program.

The United States has international obligations relating to air transportation services. As previously noted, it is a party to over 100 Open Skies agreements with foreign nations that obligate the United States to minimize regulation of foreign air transportation. Also, the United States is a party to the Convention on International Civil Aviation, which requires signatory nations to "collaborate in securing the highest practical degree of uniformity in regulations, standards, procedures and organization in relation to aircraft, personnel, airways and auxiliary services." Convention on International Civil Aviation, art. 37, Dec. 7, 1944, 15 U.N.T.S. 102. DOT must

abide by and act consistent with these obligations. *See* 49 U.S.C. § 40105(b)(1)(A) (DOT is required to act "consistently with obligations of the United States Government under an international agreement"). The states are not free to compromise these obligations. *Zschernig v. Miller*, 389 U.S. 429, 438 (1968). Yet the Ninth Circuit's decision assumes such a freedom.

As a result, the Ninth Circuit's decision impairs the ability of the Federal Government to speak with "one voice" in matters relating to foreign air transportation, particularly the adoption and enforcement of consumer protection regulations. It stands as an obstacle to the Federal Government's successful conduct of U.S. international aviation relations and the continued accomplishment of Congress's full objectives under the ADA. In such a case, state law must yield. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003) ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.") (internal citations omitted); *S.-Cent. Timber Dev., Inc. v. Wunnike*, 467 U.S. 82, 100 (1984) ("[I]t is crucial to the efficient execution of the Nation's foreign policy that the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments."); *Japan Line, Ltd.*, 441 U.S. at 449 (Foreign Commerce Clause protects the National Government's ability to speak with "one voice" in regulating commerce with foreign countries); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) ("the Federal Government must speak with one voice when

regulating commercial relations with foreign governments"); *U.S. v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement.") (internal citation omitted).

B. The Adverse Consequences of the Ninth Circuit's Flawed Preemption Analysis, if Affirmed, Would Be Long-Term and Far-Reaching.

The Ninth Circuit's decision has long-term, far-reaching and potentially disastrous consequences for the international air transportation system. State-by-state jurisprudence that effectively changes the terms of an airline's loyalty program or otherwise regulates an air carrier's agreements, conduct and activities likely will discourage carriers' participation in international alliances. Decreased participation in international alliances will result in increased travel time and decreased travel flexibility and choice for airline passengers. Airlines may choose to limit their participation in other airlines' loyalty programs or in alliances altogether, rather than deal with the uncertainty as to how a particular judge or jury will apply common law implied covenants to a particular dispute.

In fact, as the Ninth Circuit itself has recognized, the application of common law rules to international air transportation services is a concept that is "alien" to the vast majority of the nations that comprise the international aviation trading partners of the United States.[21] *Hosaka v. United Airlines, Inc.*, 305 F.3d

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[21] In this regard, it would be difficult for a nation unfamiliar with the application of U.S. common law to perceive the Ninth

989, 999 (9th Cir. 2002) (finding that the negotiating history and text of the Warsaw Convention, a principal instrument of the international aviation system, precluded a federal court from applying the federal common law doctrine of forum non conveniens). There, the Ninth Circuit noted that because forum non conveniens was a creature of the common law, it would have been alien to the civil law jurists representing the majority of countries participating in the negotiation of the Warsaw Convention. *Id.*

State regulation, whether it is based upon common or statutory law, has no legitimate role with respect to international air transportation services. [22]

IV. THE NINTH CIRCUIT'S DECISION IS A BARRIER TO HARMONIZED, INTERNATIONALLY CONSISTENT CONSUMER PROTECTION REGULATIONS.

The Ninth Circuit's decision also is a barrier to the implementation of IATA's core principles on consumer protection regulations. These principles have as their mainstay the notion that airlines and consumers benefit from harmony and consistency in how national governments define and enforce an airline's obligations to its passengers. App. 1a-5a. The Ninth Circuit's decision, however, champions

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Circuit's decision as anything other than a state court's substitution of its judgment for that of the air carrier with respect to the cancellation of a participant's membership in the frequent flyer program.

[22] The legislative history of the ADA and this Court's precedent clearly demonstrate that the ADA's preemption provision encompasses common law claims. *See Brown v. United Airlines, Inc.*, Nos. 12–1543, 12–2056, 2013 WL 3388904, at *4-5 (1st Cir. July 9, 2013).

discord. IATA's members adopted the core principles to remedy and prevent the proliferation of differing passenger rights regimes around the globe. App. 1a. The achievement of consistency and uniformity in consumer protection regulations cannot occur if the United States cannot adopt a unified and authoritative position on these issues. IATA's core principles must be implemented at a national or regional (multi-national) level. The state courts are neither competent to consider nor able to effect consistent consumer protection regulation on a case-by-case, state-by-state basis.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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July 2013

APPENDIX

APPENDIX

International Air Transport Association Resolution on IATA Core Principles on Consumer Protection

June 2013

RESOLUTION ON IATA CORE PRINCIPLES ON CONSUMER PROTECTION

AFFIRMING member airlines' commitment to the safety and comfort of passengers and to the provision of quality service;

RECOGNIZING that, in accordance with the contract of carriage, airlines strive to get passengers to their destinations on time and are highly incentivized, from a reputational and financial standpoint, to do so;

EXPRESSING CONCERN regarding the proliferation of passenger rights regimes across the globe, with around 40 regimes coming into effect in the last decade;

ACKNOWLEDGING that the resulting overlapping web of passenger rights regimes creates difficulties for airlines and confusion for customers due to a lack of certainty as to which particular regime applies and the potential application of more than one regime in a given situation;

UNDERLINING the unintended consequences of certain existing regimes, such as increasing consumer costs, reducing connectivity and increasing cancelled flights by instituting penalties and the obligation to pay compensation to passengers for delays;

NOTING the existence of an international air carrier liability regime established by the Warsaw Convention 1929 and its amending protocols (the Warsaw system) and the Montréal Convention 1999, which was adopted with a view to replacing the Warsaw system;

SEEKING a united government and industry approach to passenger rights that works for a global business and strikes a balance between ensuring adequate consumer protection and overburdening the industry and its customers with the costs of excessive regulatory compliance;

The 69th IATA Annual General Meeting:

1. ***CALLS UPON*** States to become parties to Montreal Convention 1999 as soon as possible.

2. ***ENDORSES*** the IATA Core Principles on Consumer Protection as the global industry position on best practice for national and regional passenger rights regimes.

3. ***URGES*** governments and regulatory authorities who are developing or revising passenger rights regimes to use these principles as a framework, and to acknowledge voluntary industry commitments where applicable;

4. ***ENCOURAGES*** all member airlines in jurisdictions where such regimes are being considered to proactively enter into the debate on the basis of these principles.

5. ***REQUESTS*** the International Civil Aviation Organization (ICAO) to use these principles as the basis for any ongoing ICAO initiatives on consumer protection.

PROPOSED CORE PRINCIPLES ON CONSUMER PROTECTION

- National and regional legislation should be consistent and in accordance with the international treaty regimes on air carrier liability, established by the Warsaw Convention 1929 (and its amending instruments) and the Montreal Convention 1999;
- National and regional legislation should not interfere with another States' ability to make legitimate policy choices. Passenger rights legislation, in accordance with the Chicago Convention 1944, should only apply to events occurring within the territory of the legislating State, or outside that territory with respect to aircraft registered there.
- Passenger rights legislation should allow airlines the ability to differentiate themselves through individual customer service offerings, thereby giving consumers the freedom to choose an airline that corresponds with their desired price and service standards. Governments should consider acknowledging voluntary industry commitments; government regulations should form the "lowest common denominator" and market forces should be allowed to determine additional standards of service levels.
- Passengers should have access to information on their legal and contractual rights and clear guidance on which regime applies in their specific situation;
- Passengers should have clear, transparent access to the following information:

- fare information, including taxes and charges, prior to purchasing a ticket;
- The airline actually operating the flight in case of a codeshare service;

- Airlines should employ their best efforts to keep passengers regularly informed in the event of a service disruption;
- Airlines will establish and maintain efficient complaint handling procedures that are clearly communicated to passengers;
- Airlines should assist passengers with reduced mobility in a manner compatible with the relevant safety regulations and operational considerations;
- Passenger entitlements enshrined in regulations should reflect the principle of proportionality and the impact of extraordinary circumstances;
  - There should be no compromise between safety and passenger rights protection
    - Safety-related delays or cancellations, such as those resulting from technical issues with an aircraft, should always be considered as extraordinary circumstances such as to exonerate air carriers from liability for such delays and cancellations;
  - The industry recognizes the right to re-routing, refunds or compensation in cases of denied boarding and cancellations, where circumstances are within the carrier's control;

- The industry recognizes the right to re-routing, refunds or care and assistance to passengers affected by delays where circumstances are within the carriers control;
- In cases where delays or disruptions are outside an airline's control, governments should allow market forces to determine the care and assistance available to passengers;
- The responsibilities imposed by the regulator, related to both care and assistance as well as compensation, must be fairly and clearly allocated between the different service providers involved and should not impact on the contractual freedom of all service providers.

- Passengers should be treated comparably across transport modes, taking into account the particularities of each;
- Legislation should be clear and unambiguous

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 12-462

In the

Supreme Court of the United States

NORTHWEST, INC. ET AL.,

Petitioners,

v.

RABBI S. BINYOMIN GINSBERG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR JOBS WITH JUSTICE AND THE NATIONAL EMPLOYMENT LAW PROJECT AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Jobs With Justice is a national network of local coalitions that bring together community, labor, student, and faith organizations and seek to educate and mobilize the public on issues of workers' rights. Jobs With Justice submits this amicus brief out of concern that the trucking and airline industries are seeking overbroad application of the preemptive provisions of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713, and the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c)(1). The organization has supported national claims brought by skycap employees against several airlines that have raised ADA preemption as a defense, where the plaintiffs challenged the airlines' deceptive imposition of a $2 per bag charge for curbside check-in which passengers mistook for skycaps' tips and caused devastating injury to the skycaps' income. The Massachusetts Jobs With Justice chapter submitted a similar amicus brief in a recent case before the Court, Dan's City Used Cars, Inc. v. Pelkey, 133 S.

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission. The respondent has provided its consent to the filing of this amici curiae brief, which amici have filed with the Clerk's office. The petitioner's letter consenting to the filing of all amici curiae briefs was filed with the Clerk's office on July 9, 2013.

Ct. 1769 (2013). The Court did not address the arguments that Jobs With Justice raised at that time.

The National Employment Law Project (NELP) is a non-profit legal organization with nearly 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor laws, and that employers are not rewarded for skirting those basic rights. NELP's areas of expertise include the workplace rights of workers under state and federal employment and labor laws, with an emphasis on wage and hour rights. NELP also submits this amicus brief out of concern that the trucking and airline industries are seeking overbroad application of the preemptive provisions of the ADA and FAAAA.

In this brief, amici seek to present to the Court further argument supporting the conclusion that the ADA does not preempt the respondent's implied covenant of good faith and fair dealing claim. The ADA contains a preemption clause that prevents a State from enacting or enforcing "a law, regulation, or other provision having the force and effect of law. . ." 49 U.S.C. § 14501(c)(1); 49 U.S.C. § 41713. Amici contend that, based on statutory analysis and an examination of Congressional intent, this preemption clause does not apply to common law.

The argument presented in this brief is consistent with the Court's interpretation of preemption clauses in other federal statutory schemes.

BACKGROUND AND SUMMARY OF ARGUMENT

This case involves an interpretation of the preemptive scope of 49 U.S.C. § 41713(b)(1), the Airline Deregulation Act of 1978. Although this case specifically addresses the termination of a frequent flyer program membership, the Court's decision may have an impact on the general preemptive scope of the ADA. In Ginsberg v. Northwest, Inc., 695 F.3d 873, 881 (9th Cir. 2012), the Ninth Circuit Court of Appeals held that "[n]othing in the ADA's language, history, or subsequent regulatory scaffolding suggests that Congress had a 'clear and manifest purpose' to displace State common law contract claims" that only peripherally affect deregulation of the airline industry. The decision was founded upon the principle of statutory interpretation that the historic police powers of the States are not to be superseded by federal acts in the absence of clear and manifest Congressional intent to do so. Id. at 876. The Ninth Circuit reasoned that the ADA's savings and preemption clauses, taken together, evidenced an intent to preserve remedies at common law existing at the time that Congress passed the ADA. Id. at 880. Using Morales v. Trans World Airlines Inc., 504 U.S. 374 (1992) as a guidepost, the

Ninth Circuit held that the ADA did not preempt Mr. Ginsberg's implied covenant of good faith and fair dealing claim.

The Ninth Circuit's decision in this case should be affirmed. As respondent has argued, preemption analysis under the ADA should begin with this statutory language, and the ADA's preemption clause provides only that "a State, political subdivision of a State, or political authority of at least 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier. . ." 49 U.S.C. § 41713(b)(1) (emphasis added). Through this language, Congress established that ADA preemption would be limited to positive state enactments and would not extend to common law. This interpretation is consistent with the Court's analysis of preemption clauses in other federal statutory schemes.

The Supremacy Clause of the United States Constitution empowers Congress to preempt state law "by enacting a statute containing an express preemption provision." Arizona v. United States, 132 S. Ct. 2492, 2500-01 (2012). However, "[f]ederalism, central to the constitutional design, adopts the principle that both the National and State governments have elements of sovereignty the other is bound to respect." Id. at 2500. Thus, in conducting preemption analysis, courts should assume that the States' historic police powers are

not superseded "'unless that was the clear and manifest purpose of Congress.'" Id. at 2501.

Furthermore, this Court has repeatedly established that common law preemption should only be found where the preemption language indicates such intent. For instance, in United States v. Texas, 507 U.S. 529 (1993), the Court concluded that the federal Debt Collection Act, 7 U.S.C. § 2011, et seq., did not abrogate the United States' common-law right to collect prejudgment interest on debts owed by the States. In reaching this conclusion, the Court acknowledged the "longstanding. . .principle that '[s]tatutes which invade the common law. . .are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is present.'" Id. at 534 (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)). The Court further held that "[in] order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." Id. The Second Circuit made a similar argument in Matter of Oswego Barge Corp., noting that "Congress is less likely to have intended preemption of 'long-established and familiar principles' of 'the common law . . .'" 664 F.2d 327, 339 (2d Cir. 1981).

Because "'the purpose of Congress is the ultimate touchstone' of pre-emption analysis," the Court must first and primarily focus on the language of the preemption clause. Cipollone v. Liggett

Group, Inc., 505 U.S. 504, 516-17 (1992); see also Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1986) ("Congress' intent. . .primarily is discerned from the language of the pre-emption statute. . ."); see also generally Zuni Pub. School Dist. No. 89 v. Dept. of Educ., 550 U.S. 81, 93 (2007) ("[I]f the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of the analysis.").

The ADA's preemption clause states as follows:

> Except as provided in [this subsection], a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 14501 (emphasis added).

As explained in detail below, the ADA's preemption clause does not extend to claims brought pursuant to state common law. Indeed, that is clearly not what Congress intended, in light of the language it chose to use. If Congress had intended the ADA to preempt common law claims as well as claims arising under positive enactments, it could have done so by explicitly listing "the common law,"

see, e.g., 17 U.S.C. § 301(a), or by using other broader language, as it has done in other statutes. Finally, in light of the ADA's purpose of deregulating the airline industry and avoiding diverse state "regulatory" schemes from undermining that deregulation, finding preemption of common law claims under the ADA would contravene the purpose of the statute.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE ADA PREEMPTION CLAUSE DICTATES THAT THE STATUTE PREEMPTS ONLY POSITIVE STATE ENACTMENTS, NOT COMMON LAW.

As noted above, the ADA's preemption clause applies to three categories of state claims: those arising under: (1) "a law"; (2) "a . . . regulation"; or (3) "a[n] . . . other provision having the force and effect of law . . ." 49 U.S.C. § 14501(c)(1). As the Court recognized in Sprietsma v. Mercury Marine, the first two categories do not encompass common law. 537 U.S. 51, 63 (2002). In that case, the preemption provision at issue (part of the Federal Boat Safety Act) stated that "'a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance . . .'" Id. at 58-59 (quoting 46 U.S.C. § 4306) (emphasis added). The Court held in

Sprietsma that the phrase "law or regulation" did "not encompass[] common-law claims." Id. at 63. The Court cited two reasons for this conclusion:

> First, the article "a" before "law or regulation" implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law. Second, because "a word is known by the company it keeps," . . . the terms "law" and "regulation" used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If "law" were read so broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to "regulation" in the pre-emption clause superfluous.

Id. at 63.

The Court's conclusion in Sprietsma applies with equal force here. Certainly that holding applies to "a law" and "a . . . regulation" as stated in the ADA, as that is the exact language addressed by the Court in Sprietsma. Id. Moreover, for the same reasons articulated by the Court, that analysis must also apply to "a[n] . . . other provision having the force and effect of law . . ." First, the ADA's preemption provision refers to three distinct, separate categories of legal enactments, each

modified by "a," which "implies a discreteness . . . that is not present in the common law." Id. at 63.[2] Additionally, as in Sprietsma, "[i]f 'law' were read so broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the pre-emption clause superfluous." Id. Precisely this same reasoning applies to the third category in the ADA's preemption clause; "other provision having the force and effect of law" would be rendered superfluous if "law" were read so broadly to include common law as well as other types of legal enactments.

Furthermore, as the Court recognized in Sprietsma, the three categories in the ADA's preemption clause are all "known by the company [they] keep." 537 U.S. at 63. Congress' language in the ADA's preemption clause—its use of three

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[2] There can be no question that the modifier "a" applies to all three categories, as it is a basic principle of grammar and punctuation that the use of a series of three categories, all separated by commas, clearly indicates that those three categories are to be considered distinctly and all modified by "a" (as opposed to the first two categories being grouped together and the third category standing alone). See, e.g., In re Renshaw, 222 F.3d 82, 92 (2d Cir. 2000) ("[W]hen Congress wishes to indicate that a series of items is a set of alternatives, it consistently separates the items by commas and uses an 'or' before the last one."). It would make no sense grammatically for "a" to modify "law" and "regulation" but not "other provision having the force and effect of law," nor would it make grammatical sense for "law" to be modified by "a," but not "regulation" or "other provision having the force and effect of law."

separate categories of laws—would have been an odd way to refer to common law. Congress chose to delineate three specific and separate categories of preempted state enactments, and it chose not to list "common law" among those categories.

Moreover, the doctrine of ejusdem generis dictates that the third term must be interpreted to be the same type of category as the first two terms. It would violate this canon of statutory interpretation for the last category on the list to be interpreted more broadly than the first two. See Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129 (1991) ("[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."); 2A J. Sutherland, STATUTES AND STATUTORY CONSTRUCTION § 47.17 (C. Sands 4th ed. 1973) (where "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words"); see also Washington State Dept. of Social & Health Servs. v. Ex rel Keffeler, 537 U.S. 371 (2003) ("[U]nder the established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words"). Thus, "other provision having the force and effect of law" should not be read to

mean a far broader category of law, encompassing common law, where the first two terms refer only to positive law.

Further, under a plain-language reading of the statute, the phrase "other provision having the force and effect of law" cannot include common law, as common law is simply not a "provision" of law. Indeed, common law does not meet the Black's Law Dictionary definition of "provision": "a clause in a statute, contract, or other legal instrument." Black's Law Dictionary, 1262 (8th ed. 2004). Instead, "other provision having the force and effect of law" must refer to actual intentional enactments, such as agency rules or guidelines.

Other language in the ADA preemption clause confirms that it does not cover common law. First, the statute lists three categories of entities—"a State, political subdivision of a state, or political authority of 2 or more States," § 14501(c)(1)—none of which would appear to mean courts, as opposed to legislative or regulatory bodies. Moreover, the statute speaks of affirmative pronouncements, in that it governs the "enact[ment and] enforce[ment]" of laws, regulations and other provisions. Id. On its face, this language does not appear to apply to judge-made common law. Courts do not "enforce" law; that role is for the executive branch. See, e.g., Stieberger v. Heckler, 615 F. Supp. 1315, 1356-57 (S.D.N.Y. 1985) (there are "three distinct branches of government with independently derived legal

authority and substantially separate functions—the legislature, to enact the law; the judiciary, to interpret the law, and the executive (and its administrative agencies), to enforce the law.") (emphasis added). In contrast, the language of ERISA's preemption clause (discussed in more detail in Section II, infra) explicates that it includes decisional law issued by courts, defining "State law" to include, inter alia, "decisions" and "other State action." 29 U.S.C. § 1144. The ADA contains no such language and does not otherwise give any indication that its preemption clause applies to judicial decisions.

This Court has held that statutory language closely resembling that used in the ADA does not preempt common law claims. For instance, in Cipollone v. Liggett Group, Inc., the Court held that the Federal Cigarette Labeling and Advertising Act (FCLAA) of 1965, 15 U.S.C.A. § 1334, "is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." 505 U.S. at 518-19. In the 1965 Act's preemption clause, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required . . .'" Id. at 518 (emphasis original). Accordingly, the Court's decision in Cipollone that the 1965 FCLAA, "is best read as having superseded only positive enactments by legislatures or administrative agencies . . ." id. at 518-19, applies here as well.

Furthermore, when interpreting the ADA, this Court has applied the preemption clause to enactments that quite clearly do fit into the definition of "other provision[s] having the force and effect of law," establishing that the term is not deprived of meaning if it excludes common law. For example, in Morales v. Trans World Airlines, Inc., the Court held that Travel Industry Enforcement Guidelines that had been established by the National Association of Attorneys General were preempted under the ADA, presumably as an "other provision having the force and effect of law." 504 U.S. 374, 391 (1992); see also Arapahoe County Pub. Airport Authority v. F.A.A., 242 F.3d 1213, 1222-23 (10th Cir. 2001) (holding that ban on air carrier service imposed by Arapahoe County Public Airport Authority was preempted under ADA); American Airlines, Inc. v. Dep't of Transp., 202 F.3d 788, 808 (5th Cir. 2000) (agreements between interstate air carriers and board of Dallas-Fort Worth regional airport preempted under ADA). These cases illustrate the type of enactments that would fall into the category "other provision having the force and effect of law."

II. OTHER FEDERAL STATUTES CONFIRM THAT THE ADA'S PREEMPTION CLAUSE APPLIES ONLY TO POSITIVE LAW, NOT COMMON LAW.

The Court's decisions regarding the scope of preemption clauses in other statutory schemes further confirms that the ADA's preemption clause applies only to positive law enactments, not common law. First, it is quite clear that when Congress intends to include common law claims in the scope of a preemption clause, it can do so explicitly. For example, ERISA's preemption clause states that ERISA preempts "[a]ny and all State laws," 29 U.S.C. § 1144(a), and ERISA's preemption clause expressly defines "State law" as including "all laws, decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1) (emphasis added). As the Court has recognized, "the ERISA civil enforcement mechanism is one of those provisions with such 'extraordinary preemptive power' that it 'converts an ordinary state common law complaint into one stating a federal claim. . .'" Aetna Health, Inc. v. Davila, 542 U.S. 200, 209 (2004) (quoting Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987)). Congress accomplished this "extraordinary preemptive power" quite simply, with the language "[a]ny and all State laws," 29 U.S.C. § 1144(a), and the specification that "State law" includes "decisions," 29 U.S.C. § 1144(c)(1), inter alia. In light of the broader language that Congress

chose to use in ERISA, it reasonably can be assumed that Congress understands how to create an all-encompassing preemption clause, including decisional law. It chose not to go so far with the ADA, instead carefully enumerating only specific categories of positive law that were preempted.

Congress also knows how to include common law claims expressly within a preemption clause. In the Copyright Act, for instance, the preemption clause states: "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright. . .no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." 17 U.S.C. § 301(a) (emphasis added). As the Court has recognized, Congress' objective with this clause was to create "national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation." Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989). Congress accomplished this broad preemption by use of the phrase "all legal or equitable rights" and by further specifying the inclusion of "the common law or statutes of any State." 17 U.S.C. § 301(a).

Similarly, other cases in which courts have held that federal statutes preempt state common law typically involve broad, unrestricted language in the preemption clause. The Court's decision in Cipollone highlights the importance of the specific language used in the preemption clause, as the Court only

found common law to be preempted when precise language ("statement") was replaced with broader, unrestricted language ("requirement or prohibition"). 505 U.S. at 504. Specifically, after holding that the narrowly tailored "statement" language of the 1965 FCLAA did not preempt common law, the Court held that the preemption clause in the subsequent version of the statute, the Public Health Cigarette Smoking Act of 1969, did preempt common law claims as well as positive enactments. Id. That clause held that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act," 15 U.S.C. § 1334(b) (emphasis added).[3] The Court's holding in Cipollone further confirms that the ADA's preemption clause does not include common law claims. First, the Court held in Cipollone that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily

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[3] Moreover, the Court made clear in Cipollone that the language of the preemption clause, not the legislative history, controls in determining the scope of preemption. Specifically, the Court noted that "portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities," but nevertheless held that common law claims were preempted because "the language of the Act plainly reaches beyond such enactments." Id. at 521.

encompass obligations that take the form of common law rules." 505 U.S. at 521. In contrast, the ADA's preemption clause does not speak broadly of "requirements" or "prohibitions" (in any form) but focuses solely on three categories of enactments—"law[s]," "regulation[s]," and "other provision[s]" that are "enact[ed]" or "enforce[d]" by the states. 49 U.S.C. § 14501(c)(1).

As in Cipollone, the Court held in Riegel v. Medtronic, Inc. that the broad language "requirement[s]" included common law claims. 552 U.S. 312, 332 (2008) (analyzing 21 U.S.C. § 360k(a)). Notably, in reaching its conclusion in Riegel, the Court reasoned: "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments." Id. at 324. Just as Congress is entitled to know that the Court will interpret the broad term "requirement" broadly, it is entitled to know that courts generally will give meaning to its more carefully drawn preemption clauses, including those such as the ADA, which refers only to specific categories of positive law enactments. It avoids broad terms such as those in ERISA ("[a]ny and all State laws," 29 U.S.C. § 1144(a)) that is defined to include decisional law, the Copyright Act ("right. . .under the common law," 17 U.S.C. § 301(a)), and the statutes discussed in Cipollone ("requirement or prohibition," 15 U.S.C. § 1334(b)) and Riegel ("requirement, 21 U.S.C. § 360k(a)).

III. THE ONLY WAY TO EFFECT THE PURPOSE BEHIND THE ADA'S PREEMPTION CLAUSE IS TO CONCLUDE THAT IT PREEMPTS ONLY POSITIVE LAW ENACTMENTS.

The only way to give effect to the purpose behind the ADA's preemption clause is to conclude that "other provision having the force and effect of law" refers only to positive enactments. Prior to 1978, the transportation industry was subject to extensive economic regulation which insulated incumbent airlines and ground carriers from competition and produced higher prices and inefficiencies. See H.R. Rep. No. 95–1211, at 2-3 (1978) (noting the "highly anticompetitive" results from pre-1978 federal regulation of airline industry, including limited approvals of route applications and high fares).

Congress addressed these problems by deregulating both the airline and trucking industries. First, it enacted the ADA, replacing federal economic regulation of the airline industry with a policy of "'maximum reliance on competitive market forces.'" Morales, 504 U.S. at 378 (quoting the ADA). To prevent the States from undoing deregulation with their own regulatory enactments, the ADA included a preemption provision, prohibiting states from enforcing any law "relating to rates, routes, or services" of any air carrier. Id. (quoting the ADA). As recognized by the Court, the

ADA's preemption clause applied only to "state-imposed obligations." American Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995).

Two years later, Congress deregulated the trucking industry through the Motor Carrier Act of 1980, but Congress did not initially include a preemption provision in the Act. Congress later decided that preemption was necessary in order to eliminate the inefficiencies, costs, and inhibition of innovation caused by the "patchwork" of anticompetitive regulations in various jurisdictions. H.R. Conf. Rep. 103-677 at 87 (1994) (on the FAAAA). Accordingly, in 1994, Congress enacted the FAAAA's preemption provision, using wording almost identical to that in the ADA. Congress' purpose was "to prevent States from undermining federal deregulation of interstate trucking." American Trucking Ass'ns, Inc. v. City of Los Angeles, 660 F.3d 384, 395 (9th Cir. 2011), as amended (Oct. 31, 2011) (citing Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 368 (2008)). The ultimate goal was to address "the sheer diversity of [state] regulatory schemes." H.R. Conf. Rep. 103-677 at 877 (emphasis added).

The history and purpose of both the ADA and the FAAAA make it clear that Congress wrote preemption clauses to protect the industries from affirmative state enactments—not from common law claims. Both the ADA and FAAAA were enacted to remedy the variety of anticompetitive regulations

across jurisdictions, whereas common law claims play no role in the "patchwork" of "regulations" Congress sought to avoid. H.R. Conf. Rep. 103-677 at 87 (1994). A common law claim would not have the feared effect of undermining federal deregulation of airlines. Therefore, in light of the particular harms the ADA's preemption clause was designed to resolve, it would run contrary to Congressional purpose for the Court to ignore the statutory language that Congress chose to enact and to hold that the ADA preempts common law claims as well as claims based on positive state law enactments.

CONCLUSION

For the reasons described above, the Court should hold that the ADA does not preempt common law claims.

Respectfully submitted,

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